DOCKET

No. 08-1200
Title: Karen L. Jerman, Petitioner
v.
Carlisle, McNellie, Rini, Kramer & Ulrich LPA, et al.
Docketed: March 27, 2009
Lower Ct: United States Court of Appeals for the Sixth Circuit
Case Nos.: (07-3964)
Decision Date: August 18, 2008
Rehearing Denied: November 24, 2008
Questions Presented

Date	Proceedings and Orders
Feb 13 2009	Application (08A710) to extend the time to file a petition for a writ of certiorari from February 22, 2009 to March 25, 2009, submitted to Justice Stevens.
Feb 17 2009	Application (08A710) granted by Justice Stevens extending the time to file until March 25, 2009.
Mar 25 2009	Petition for a writ of certiorari filed. (Response due April 27, 2009)
Apr 24 2009	Waiver of right of respondents Carlisle, McNellie, Rini, Kramer & Ulrich LPA, et al. to respond filed.
May 5 2009	DISTRIBUTED for Conference of May 21, 2009.
May 7 2009	Response Requested. (Due June 8, 2009)
Jun 8 2009	Brief of respondents Carlisle, McNellie, Rini, Kramer & Ulrich LPA, et al. in opposition filed. (Distributed)
Jun 9 2009	DISTRIBUTED for Conference of June 25, 2009.
Jun 11 2009	Reply of petitioner Karen L. Jerman filed. (Distributed).
Jun 29 2009	Petition GRANTED.
Aug 4 2009	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including September 21, 2009.
Aug 4 2009	The time within which to file respondents' brief on the merits is extended to and including November 23, 2009.
Aug 4 2009	Petitioner will file the reply brief on the merits on or before December 17, 2009.
Aug 6 2009	Consent to the filing of amicus curiae briefs in support of either party received from counsel for the petitioner.
Aug 13 2009	Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for the respondents
Sep 4 2009	Motion to dispense with printing the joint appendix filed by petitioner Karen L. Jerman.
Sep 21 2009	Brief of petitioner Karen L. Jerman filed.
Sep 25 2009	Brief amicus curiae of United States filed.
Sep 28 2009	Brief amici curiae of Public Citizen, Inc., et al. filed.
Sep 28 2009	Brief amici curiae of New York, et al. filed.
Oct 5 2009	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Nov 2 2009	SET FOR ARGUMENT ON Wednesday, January 13, 2010.
Nov 23 2009	CIRCULATED.
Nov 23 2009	Record received from the U.S.C.A. for Sixth Circuit. (1 binder)

Nov 23 2009 Brief of respondents Carlisle, McNellie, Rini, Kramer & Ulrich LPA, and Adrienne Foster filed. (Distributed)

Nov 25 2009 Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.

Nov 25 2009 Brief amici curiae of Ohio Creditor's Attorneys Association, et al. filed. (Distributed)

Nov 30 2009 Brief amicus curiae of DRI - Voice of the Defense Bar filed. (Distributed)

Nov 30 2009 Brief amicus curiae of American Legal and Financial Network filed.

Nov 30 2009 Brief amicus curiae of USFN - America's Mortgage Banking Attorneys filed. (Distributed)

Nov 30 2009 Brief amicus curiae of California Association of Collectors filed. (Distributed)

Nov 30 2009 Brief amici curiae of Commercial Law League of America, and DBA International filed. (Distributed)

Nov 30 2009 Brief amicus curiae of ACA International filed. (Distributed)

Nov 30 2009 Brief amicus curiae of National Association of Retail Collection Attorneys filed. (Distributed)

Nov 30 2009 Brief amici curiae of Mississippi Creditors' Attorneys Association filed. (Distributed)

Dec 14 2009 Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.

Dec 17 2009 Reply of petitioner Karen L. Jerman filed. (Distributed)

Jan 13 2010 Argued. For petitioner: Kevin K. Russell, Bethesda, MD.; and William M. Jay, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.) For respondents: George S. Coakley, Cleveland, Ohio.

PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

KAREN L. JERMAN,

Petitioner,

v.

CARLISLE, MCNELLIE, RINI, KRAMER & ULRICH LPA
AND
ADRIENNE S. FOSTER,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a debt collector's legal error qualifies for the bona fide error defense under the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Karen L. Jerman respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Sixth Circuit (Pet. App. 1a-18a) is published at 538 F.3d 469. The order denying the petition for rehearing and rehearing en banc (Pet. App. 42a) is unpublished. The district court's opinion (Pet. App. 19a-41a) is published at 502 F. Supp. 2d 686.

JURISDICTION

This judgment of the court of appeals was entered on August 18, 2008. The order denying rehearing and rehearing en banc was entered on November 24, 2008. Pet. App. 42a. On February 17, 2009, Justice Stevens extended the time to file this petition to and including March 25, 2009. App. No. 08A710. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 1692k of Title 15 of the United States Code – a provision of the Fair Debt Collection Practices Act (FDCPA) – provides in relevant part:

> (c) Intent
>
> A debt collector may not be held liable in any action brought under this title if the debt collector shows by a preponderance of evidence that the violation was not

> intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.
>
> . . .
>
> (e) Advisory opinions of [the Federal Trade] Commission.
>
> No provision of this section imposing any liability shall apply to any act done or omitted in good faith in conformity with any advisory opinion of the Commission, notwithstanding that after such act or omission has occurred, such opinion is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

As originally enacted, Section 1640 of Title 15 of the United States Code – a provision of the Truth in Lending Act (TILA) – provided in relevant part:

> (c) Unintentional violations; bona fide errors
>
> A creditor or assignee may not be held liable in any action brought under this section or section 1635 of this title for a violation of this subchapter if the creditor or assignee shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

In 1980, Congress amended the Truth in Lending Act to add the following sentence to the end of Section 1640(c):

> Examples of a bona fide error include, but are not limited to, clerical, calculation, computer malfunction and programming, and printing errors, except that an error of legal judgment with respect to a person's obligations under this subchapter is not a bona fide error.

STATEMENT OF THE CASE

The Fair Debt Collection Practices Act ("FDCPA") protects consumers by prohibiting abusive debt collection. This case presents an important question of law over which federal courts are irreconcilably divided: whether debt collectors can avoid liability on the basis that they violated the FDCPA as a result of a reasonable legal mistake. That question substantially affects the enforcement of a significant and frequently employed piece of federal consumer protection legislation.

1. Congress enacted the FDCPA in 1977 in light of "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors." 15 U.S.C. § 1692(a). Among the problems that Congress sought to address in the FDCPA were cases in which "debt collectors [were] dunning the wrong person or attempting to collect debts which the consumer has already paid." S. REP. NO. 95-382, at 4 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1695, 1699. Thus, the FDCPA requires debt collectors to send the consumer a written "validation notice" that specifies, among other things, the amount of the debt, the creditor's name, and an explanation of how the consumer can dispute the debt. 15 U.S.C. § 1692g(a).

Under the FDCPA, both the Federal Trade Commission (FTC), *see* 15 U.S.C. § 1692l, and "consumers who have been subjected to collection abuses," S. REP. NO. 95-382, at 5 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1695, 1699; *see* 15 U.S.C. § 1692k, may bring civil suits against debt collectors who are alleged to have violated the Act. When a violation is established, individual consumers may recover their actual damages plus a maximum of one thousand dollars in statutory damages; awards in a class action are limited to actual damages plus the lesser of either $500,000 or one percent of the debt collector's net worth. 15 U.S.C. § 1692k(a). Reflecting Congress's choice of "a 'private attorney general' approach to assume enforcement of the FDCPA," *see Tolentino v. Friedman*, 46 F.3d 645, 651 (7th Cir.), *cert. denied*, 515 U.S. 1160 (1995), a consumer is also entitled to a reasonable attorney's fee whenever a debt collector is found to have violated the FDCPA, *see* 15 U.S.C. § 1692k(a).

Debt collectors who are found to have violated the Act may nonetheless avoid liability if they can establish either of the two defenses provided by the FDCPA. First, a "safe harbor" defense carves out an exemption for debt collectors who relied in good faith on an advisory opinion issued by the Federal Trade Commission ("FTC"). 15 U.S.C. § 1692k(e). Debt collectors can seek such an opinion through a written request that provides the Commission with all of the material facts and outlines the unresolved legal issue. 16 C.F.R. § 1.2(a). Second, a "bona fide error" defense exempts debt collectors from liability if they prove that "the violation was not intentional and resulted from a bona fide error notwithstanding the

maintenance of procedures reasonably adapted to avoid any such error." 15 U.S.C. § 1692k(c).

2. Respondents were retained by Countrywide Home Loans, which held the mortgage on petitioner's house. Pet. App. 2a. In April 2006, respondents filed a complaint in state court to foreclose on the house, *id.*; three days later, petitioner was served with both the complaint and, as required by the FDCPA, a validation notice informing her of her legal rights, Pet. App. 2a-3a.

Under the FDCPA, the validation notice was required to indicate that the alleged debt would be presumed valid unless "within thirty days after receipt of the notice, [petitioner] dispute[d] the validity of the debt . . . ." 15 U.S.C. § 1692g(a)(3). However, the validation notice instead indicated that the debt would be presumed valid unless disputed "in writing." Pet. App. 3a. When petitioner disputed the debt, Countrywide checked its records and discovered that petitioner had fully repaid her mortgage. *Id.* Respondents then dismissed the complaint. *Id.*

3. Petitioner subsequently filed this suit in federal court, alleging that the validation notice violated Section 1692g(a)(3) of the FDCPA by requiring her to dispute her debt "in writing." Pet. App. 3a. She sought statutory damages and class certification. *Id.* The district court agreed that respondents had violated the FDCPA, but it nonetheless granted respondents' motion for summary judgment. In the court's view, the bona fide error defense extended to legal mistakes such as the one at issue in this case. Pet. App. 3a-4a. Moreover, the court concluded, respondents qualified for the defense because the violation was not

intentional, it was made in good faith, and the defendants maintained procedures reasonably adapted to avoid such errors: case law regarding the use of the "in writing" requirement was unsettled – with no published Sixth Circuit opinion on the question and conflicting decisions from two other courts of appeals – and the principal attorney in respondents' firm made efforts to comply with the FDCPA that included attending seminars and distributing cases to the firm's employees, Pet. App. 35a-40a.

4. On appeal, the Sixth Circuit affirmed. Pet. App. 18a. Recognizing that federal courts of appeals are "divided as to whether the bona fide error defense applies to mistakes of law or is limited . . . to procedural or clerical errors," the panel followed the Tenth Circuit in rejecting the majority position adopted by the Second, Eighth, and Ninth Circuits. Pet. App. 8a-12a. The panel deemed unpersuasive the majority rule that Section 1692k(c)'s bona fide error defense should be interpreted consistently with the parallel defense in the Truth in Lending Act ("TILA"), 15 U.S.C. § 1640(c), which courts at the time of the FDCPA's enactment had overwhelmingly interpreted to apply to clerical and computation errors, but had declined to extend to legal errors. The Sixth Circuit noted that Congress had later amended the TILA – but not the FDCPA – to make that limitation explicit. Pet. App. 13a-14a. The absence of a similar amendment to the FDCPA, the panel reasoned, "suggest[ed] that . . . Congress did not intend to limit the defense to clerical errors." Pet. App. 14a. Moreover, the panel posited, "protection for attorneys who make bona fide errors of law is

consistent with the FDCPA's purpose of eliminating abusive debt collection practices and ensuring that those debt collectors who refrain from abusive collection practices are not competitively disadvantaged." Pet. App. 14a.

On November 24, 2008, petitioner's timely petition for rehearing and for rehearing en banc was denied. Pet. App. 36a.

REASONS FOR GRANTING THE WRIT

Congress enacted the FDCPA to protect consumers by prohibiting abusive debt collection practices. Federal courts are deeply divided over whether the law excuses violations that result from legal mistakes. This conflict is particularly untenable in light of current economic conditions: as more consumers find themselves unable to repay their debts, efforts to collect those debts are likely to increase in both number and intensity. This case presents an ideal opportunity for this Court to resolve the three-to-two circuit split, which was both squarely raised below and outcome-determinative in the Sixth Circuit's decision. Not only are the circuits irreconcilably divided, but the Sixth Circuit's decision is also wrong on the merits and frustrates the purpose and operation of the FDCPA.

I. Federal Courts Are Intractably Divided Over Whether The Fair Debt Collection Practices Act Excuses Violations That Result From Legal Mistakes.

Three courts of appeals – the Second, Eighth, and Ninth Circuits – have held that the FDCPA's bona fide error defense does not apply to violations

that result from legal mistakes. In this case, the Sixth Circuit joined the Tenth Circuit in reaching a contrary conclusion that the defense extends to legal mistakes. Numerous courts of appeals and commentators have recognized this direct split in authority. *See, e.g.*, *Seeger v. AFNI, Inc.*, 548 F.3d 1107, 1114 (7th Cir. 2008) ("Recently, we noted that a split exists among the circuits on this question. We noted . . . that the majority of our sister circuits, including the Second, Eighth, and Ninth, have limited the defense to factual and clerical errors, while a growing minority have applied the defense to mistakes of law." (internal citation and quotations omitted)); *Johnson v. Riddle*, 305 F.3d 1107, 1121 (10th Cir. 2002) ("Outside this circuit, federal courts have split on the issue . . . ."); Elwin Griffith, *Identifying Some Trouble Spots in the Fair Debt Collection Practices Act: A Framework for Improvement*, 83 NEB. L. REV. 762, 814-18 (2005) [hereinafter *Trouble Spots*] (describing the circuit split).

1. Petitioner would have prevailed in the Ninth Circuit. In *Baker v. G. C. Services Corp.*, 677 F.2d 775 (9th Cir. 1982), a debt collector appealed the district court's decision holding that it had violated the FDCPA by, among other things, failing to inform the debtor that he could dispute a portion of the debt. The court of appeals affirmed. It reasoned that Congress, in Section 1692g(a)(3), "clearly required the notice to inform the debtor that he could dispute any portion of the debt," 677 F.2d at 778, and that the notice sent by the debt collector to the debtor was "simply not sufficient to put a debtor on notice" of that fact, *id.* Having found a violation of the FDCPA,

the Ninth Circuit then rejected the debt collector's argument that its conduct was shielded by the bona fide error defense, holding instead that, under the FDCPA, "a mistake about the law is insufficient by itself to raise the bona fide error defense." *Id.* at 779. The panel reasoned that Section 1692k(c)'s bona fide error defense was "nearly identical" to the same defense in the Truth in Lending Act. Courts had consistently construed the TILA defense, which – like the FDCPA – excuses violations that are "not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error," as applying only to clerical errors. *Id.*

Two years after the Ninth Circuit decided *Baker*, the Eighth Circuit agreed that the FDCPA's bona fide error defense did not apply to legal mistakes. *Hulshizer v. Global Credit Servs., Inc.*, 728 F.2d 1037, 1038 (8th Cir. 1984) ("[W]e agree with the Ninth Circuit that reliance on the advice of counsel or a mistake about the law is not protected . . . ."); *see also Picht v. John R. Hawks, Ltd.*, 236 F.3d 446, 452 (8th Cir. 2001) (affirming that "*Hulshizer* remains the law of this Circuit"). The Second Circuit subsequently adopted the same interpretation, as did the Supreme Court of Montana. *See Pipiles v. Credit Bureau of Lockport, Inc.*, 886 F.2d 22, 27 (2d Cir. 1989) ("In any event, it is likely that the violations . . . resulted from a mistaken view of the law, which section 1692k(c) does not excuse.") (citing *Baker* and *Hulshizer*); *Collection Bureau Servs. v. Morrow*, 87 P.3d 1024, 1030-31 (Mont. 2004) (recognizing the "split of authority among the circuit courts on" the bona fide error defense question and following majority view").

2. This majority view conflicts not only with the decision below, but also with the Tenth Circuit's holding in *Johnson v. Riddle*, 305 F.3d 1107 (2002), that the FDCPA's bona fide error defense applies to legal mistakes. In *Johnson*, the Tenth Circuit agreed with the consumer – who had bounced a check for $2.64 – that the debt collector had violated the FDCPA by attempting to collect an amount not "permitted by law," 15 U.S.C. § 1692f(1): specifically, although state law authorized a service charge of up to fifteen dollars for bad checks, the debt collector sought to recover a $250 penalty under the state's shoplifting statute. However, like the Sixth Circuit, the Tenth Circuit declined to construe the FDCPA's bona fide error defense consistently with its TILA counterpart, citing the express exclusion of legal mistakes from the current version of the TILA's bona fide error defense. *Id.* at 1122-23.

In its opinion, the Tenth Circuit acknowledged that its interpretation of "bona fide error" was in some tension with the FDCPA's reference to "maintenance of procedures reasonably adapted to avoid any such error," and it conceded that "it is more common to speak of procedures adapted to avoid clerical errors than to speak of procedures adopted [sic] to avoid mistakes of law." 305 F.3d at 1123. However, the Tenth Circuit was ultimately persuaded by the absence of any language or legislative history reflecting Congress's intent to limit the bona fide error defense, as well as by a concern that a narrow reading of the defense would leave debt-collecting lawyers exposed to liability for any unsuccessful suit against a consumer. *Id.* at 1123-24.

3. Certiorari is warranted because the circuit split is considered and entrenched. In concluding that the bona fide error defense extends to legal errors, the Sixth and Tenth Circuits specifically considered and rejected not only the holdings but also the reasoning of the Second, Eighth, and Ninth Circuits. *See* Pet. App. 8a-14a; *Johnson*, 305 F.3d at 1121-23. Moreover, there is no reason to believe that any of the circuits will reconsider their positions: the Eighth Circuit in *Picht* has reaffirmed its holding in *Hulshizer*, and the Sixth Circuit denied rehearing en banc in this case. Pet. App. 42a. As a result, it is unlikely that this conflict will be resolved without this Court's intervention.

4. Current economic conditions, and in particular the growing number of foreclosures, also render this Court's intervention essential. Actions under the FDCPA are widespread, as are consumer complaints to the FTC about FDCPA violations: in 2007 alone, the FTC received more than 70,000 such complaints. FEDERAL TRADE COMMISSION, ANNUAL REPORT 2008: FAIR DEBT COLLECTION PRACTICES ACT 4 [hereinafter FTC ANNUAL REPORT], *available at* http://www.ftc.gov/os/2008/03/P084802fdcpareport.pdf. This number is all but certain to rise in the years to come as consumers find themselves increasingly unable to repay their debts.

Indeed, the question presented arises regularly across the country. *E.g.*, *Campbell v. Hall*, No. 2:06-CV-127 JVB, 2009 U.S. Dist. LEXIS 21416, at *23-*29 (Mar. 17, 2009); *Pescatrice v. Orovitz*, 539 F. Supp. 2d 1375, 1379 n.1 (S.D. Fla. 2008); *Richburg v. Palisades Collection LLC*, 247 F.R.D. 457, 466 (E.D. Pa. 2008); *Miller v. Javitch, Block & Rathbone*, 534 F.

Supp. 2d 772, 777 (S.D. Ohio 2008); *Gervais v. Riddle & Assocs.*, 479 F. Supp. 2d 270, 279 (D. Conn. 2007); *Hunt v. Check Recovery Sys.*, 178 F. Supp. 2d 1157, 1170 (N.D. Cal. 2007); *Cohen v. Beachside Two-I Homeowners' Ass'n*, No. 05-706 ADM/JSM, 2005 U.S. Dist. LEXIS 28536, at *22-*25 (D. Minn. Nov. 17, 2005); *Akalwadi v. Risk Mgmt. Alternatives, Inc.*, 336 F. Supp. 2d 492, 503 (D. Md. 2004); *Rosado v. Taylor*, 324 F. Supp. 2d 917, 932 (N.D. Ind. 2004); *Caputo v. Prof'l Recovery Servs.*, 261 F. Supp. 2d 1249, 1255 (D. Kan. 2003); *Shapiro v. Haenn*, 222 F. Supp. 2d 29, 43 (D. Me. 2002); *Sibley v. Firstcollect, Inc.*, 913 F. Supp. 469, 472 (M.D. La. 1995).

The ongoing and irreconcilable disagreement over the scope of the bona fide error defense undermines the FDCPA's purpose of promoting "consistent [government] action to protect consumers against debt collection abuses." 15 U.S.C. § 1692(e). Without a uniform interpretation, the protections provided by the FDCPA turn on accidents of geography. In the Second, Eighth, and Ninth Circuits, debt collectors are strictly liable for FDCPA violations unless they made a bona fide clerical error or relied on an FTC advisory opinion. Yet, in the Sixth and Tenth Circuits, where the bona fide error defense applies to legal mistakes, "[debt] collectors are not afraid to use aggressive tactics in the collection process. If they cross the line sometimes, they hope that the bona fide error defense will bail them out." *Trouble Spots*, *supra*, at 820-21. As the law stands, the rights of two consumers who receive identical validation notices from the same debt collector containing the same legal mistake may

depend on whether they live in Kansas City, Kansas or Kansas City, Missouri.

6. This case is an ideal vehicle for this Court to resolve the question presented, which is both squarely raised by, and outcome determinative of, this case. There is no dispute that respondent's inclusion of the "in writing" requirement in the validation notice sent to petitioner was a legal mistake. Pet. App. 26a n.1; Pet. App. 4a n1; Pet. App. 5a n.2. And the underlying facts of the case are not at issue: the district court held that respondents had violated the FDCPA, and respondents did not cross-appeal that determination. Pet. App. 5a n.2. Thus, the decision below hinged solely on whether the bona fide error defense extends to legal mistakes.

II. The Sixth Circuit's Decision Is Wrong On The Merits.

This Court also should grant certiorari because the Sixth Circuit's decision is wrong on the merits, as the FDCPA's bona fide error defense does *not* apply to legal mistakes. First, the language and structure of the FDCPA demonstrate that Congress did not intend the bona fide error defense to apply to legal errors: not only did Congress adopt the same language that it had used in the Truth in Lending Act ("TILA") – language which courts had declined to extend to legal mistakes – but it also enacted a separate "safe harbor" provision (not applicable here) to exempt debt collectors from liability for certain legal mistakes. Second, a narrow reading of the bona fide error defense is most consistent with the FDCPA's purpose of protecting consumers from abusive debt collection practices.

A. The Structure And Text Of The FDCPA Demonstrate That Congress Did Not Intend The Bona Fide Error Defense To Apply To Legal Errors.

1. Congress Enacted A Separate "Safe Harbor" Defense To Protect Debt-Collectors From Legal Mistakes.

The structure of the FDPCA confirms that the bona fide error defense applies to clerical errors, but does not extend to legal errors. In the rare circumstances in which the legal obligations imposed by the FDCPA are genuinely unclear, Congress provided a separate exemption to address any ambiguities in the law: the "safe harbor provision" provision, which allows debt collectors to rely on official advisory opinions issued by the FTC. Applying the bona fide error defense to legal errors would strip the safe harbor defense of any practical effect.

a. Compliance with the FDCPA is straightforward. It involves "a set of rules which debt collectors themselves have testified are easy to follow and do not restrict the business of ethical debt collectors." 131 Cong. Rec. H10534 (daily ed. Dec. 2, 1985) (remarks of Rep. Annunzio). In the relatively few cases in which the FDCPA is genuinely ambiguous, debt collectors have two options to avoid liability for violations arising from mistakes of law. First, they can err on the side of caution and opt not to engage in practices that may violate the Act. Second, the FDCPA specifically exempts from liability "any act done or omitted in good faith in conformity with any advisory opinion of the [Federal

Trade] Commission." 15 U.S.C. § 1692k(e). The FTC provides such advisory opinions to resolve uncertainty in circumstances where "[t]he matter involves a substantial or novel question of fact or law and there is no clear Commission or court precedent." 16 C.F.R. § 1.1(a)(1). Having explicitly included a mechanism to encourage debt collectors to avoid liability for mistakes of law by going to the FTC to resolve any statutory ambiguities, Congress was unlikely to have intended that debt collectors could disregard that mechanism and rely instead on the bona fide error defense. *See United Savings Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (ambiguous statutory provisions are "often clarified by the remainder of the statutory scheme").

b. In practice, extending the bona fide error defense to apply to legal mistakes would eviscerate the safe harbor defense, violating this Court's rule against superfluity. *See Hibbs v. Winn*, 542 U.S. 88, 101 (2004) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . .") (quoting 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46.06 (rev. 6th ed. 2000)); *see Williams v. Taylor*, 529 U.S. 362, 404 (2000) (giving effect to "every clause and word of a statute" is a "cardinal principle" of interpretation). If the bona fide defense does not extend to legal errors, debt collectors can avoid liability for such mistakes only if the FTC has approved those practices. If, however, the bona fide error defense also applies to legal mistakes, aggressive debt collectors would have no incentive to seek FTC advice when their

obligations under the FDCPA are unclear. Instead, they can escape liability simply by showing that there was no clear precedent prohibiting their actions. In effect, aggressive debt collectors can rely on a lack of guidance, rather than on having sought guidance, to immunize themselves. *See, e.g.*, *Miller v. Javitch, Block & Rathbone, LLP*, 534 F. Supp. 2d 772, 778 (S.D. Ohio 2008) (holding that bona fide error defense applied when defendants spent "considerable time, effort and research . . . evaluating the sufficiency of" the complaint "in light of the recent decisions in this district," notwithstanding that complaint was drafted to circumvent state procedural requirements).

c. Moreover, interpreting the FDCPA's bona fide error defense as applying to clerical errors is more consistent with the text of the statute itself, which requires debt collectors to demonstrate that the violation was unintentional, made in good faith, and occurred "notwithstanding procedures reasonably adapted to avoid any such error." 15 U.S.C. § 1692k(c). As even the Sixth and Tenth Circuits have acknowledged, "it is more common to speak of procedures adapted to avoid clerical errors than to speak of procedures adopted [sic] to avoid mistakes of law." Pet. App. 11a (quoting *Johnson*, 305 F.3d at 1123).

This interpretation is also more consistent with the general principle that a party is presumed to have knowledge of the law. *See, e.g.*, *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947). As one court has explained, a legal mistake "is no excuse for the violation of a statute. To hold otherwise would violate an established principle of law and

would furnish . . . a convenient excuse for an evasion of the law." *Atlas Realty Corp. v. House*, 192 A. 564, 567 (Conn. 1937). Indeed, respondents are essentially seeking to assert a form of qualified immunity here – that is, their violation of the FDCPA should be excused because they acted in good faith. But this Court has made clear that qualified immunity was developed for special reasons – viz., to protect the "government's ability to perform its traditional functions," *Wyatt v. Cole*, 504 U.S. 158, 167 (1992) – and has been reluctant to extend the doctrine beyond that context, *see, e.g.*, *Richardson v. McKnight*, 521 U.S. 399, 407-08 (1997) (declining to extend qualified immunity in Section 1983 cases to guards at private prisons).

2. *The Bona Fide Error Defense In The FDCPA Is Identical To The Original Bona Fide Error Defense In The TILA, Which Courts Have Declined To Extend To Legal Errors.*

Just last Term, this Court recognized that when courts "have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its judicial interpretations as well." *Rowe v. N.H. Motor Transp. Ass'n*, 128 S. Ct. 989, 994 (2008) (internal citation omitted). When Congress enacted the FDCPA in 1977, it included a bona fide error defense that was identical to the one it had enacted nine years before in the TILA. *Compare* 15 U.S.C. § 1692k(c) (1982) *with* 15 U.S.C. § 1640 (1982). Debt collectors under the FDCPA, like creditors under the TILA, could avoid liability if they

showed "by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error."

Courts construing the TILA had consistently held that the defense applied only to clerical errors.[1] Those courts frequently relied on *Ratner v. Chemical Bank N.Y. Trust Co.*, 329 F. Supp. 270 (S.D.N.Y. 1971), in which the court concluded – based on an extensive review of the TILA's history – that Congress had added the bona fide error defense only to address complaints from businessmen and others that "mathematical and clerical errors" were "inevitable" in the lending process. *Id.* at 281-82 (discussing *Hearings on S. 5 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency*, 90th Cong. 64, 226, 374, 426-27, 529, 584, 698 (1967)). The court emphasized that the law's "paramount" aim was to protect consumers, and merely relying on a "reasonable" interpretation of the statute would not excuse violating consumer rights. *Id.* at 282.

In 1980 – three years after enacting the FDCPA – Congress amended the TILA to "provide the consumer with clearer credit information [and]

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[1] *E.g.*, *Turner v. Firestone Tire & Rubber Co.*, 537 F.2d 1296, 1298 (5th Cir. 1976) (referring to this section as the "so-called clerical error defense"); *Ives v. W. T. Grant Co.*, 522 F.2d 749, 758 (2d Cir. 1975); *Palmer v. Wilson*, 502 F.2d 860, 861 (9th Cir. 1974); *Haynes v. Logan Furniture Mart, Inc.*, 503 F.2d 1161, 1167 (7th Cir. 1974).

make creditor compliance easier." S. REP. NO. 96-368, at 16 (1979), *as reprinted in* 1980 U.S.C.C.A.N. 236, 251. Among other things, the Truth in Lending Simplification and Reform Act added a sentence to the TILA to illustrate the intended scope of the bona fide error defense, providing that "[e]xamples of a bona fide error include, but are not limited to, clerical, calculation, computer malfunction and programming, and printing errors, except that an error of legal judgment with respect to a person's obligations under this subchapter is not a bona fide error." However, nothing about this addition to the TILA changed the meaning of the operative language of the statute, which continues to provide that a creditor can avoid liability for a violation of the TILA when "the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." And by not changing the operative language, Congress made clear that it had merely "*clarified* [the defense] to make clear that it applies to mechanical and computer errors, provided that they are not the result of erroneous legal judgments." S. REP. NO. 96-73, at 7-8 (1979), *as reprinted in* 1980 U.S.C.C.A.N. 280, 285-86; *see* Pub. L. No. 96-221, 94 Stat. 164 (1980).

Contrary to the view of the court of appeals in this case, nothing about that amendment changed the longstanding interpretation of the TILA bona fide error defense, which continues to share the same operative language as the FDCPA. Because it is clear that this operative language excludes legal mistakes, the decision below is erroneous. Moreover, when Congress enacts a statute using identical language to

a related statute, amending one does not affect the interpretation of the other. *See, e.g.*, *Smith v. City of Jackson, Miss.*, 544 U.S. 228, 240 (2005) (amendments to Title VII in 1991 "did not amend the ADEA" and the "pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA").

B. The Narrow, Traditional Reading Of The Bona Fide Error Defense Is Consistent With The FDCPA's Purposes.

1. Expanding The Scope Of The Bona Fide Error Defense To Include Legal Mistakes Would Frustrate The Act's Purpose Of Eliminating Abusive Debt Collection Practices And Protecting Consumers.

Congress enacted the FDCPA "to eliminate abusive debt collection practices by debt collectors" and "to protect consumers against debt collection abuses." 15 U.S.C. § 1692(e). As Congress recognized, debt collectors have enormous incentives to pursue consumers aggressively: they work on commission and are not constrained by the same reputational concerns as the creditors for whom they work. S. REP. NO. 95-382, at 2 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1695, 1696. Congress thus sought to curtail abusive tactics that ranged from midnight telephone calls to false threats of legal proceedings to the misrepresentation of legal rights found in this case. *Id.* To this end, the FDCPA draws a clear line between proscribed and acceptable debt collection practices. Debt collectors know their obligations, and consumers know their rights.

Expanding the bona fide error defense to apply to legal mistakes would frustrate Congress's goal of protecting consumers from abuse. Under the interpretation adopted by the Sixth and Tenth Circuits, debt collectors could escape liability for violations whenever the law is unsettled, regardless whether the FTC has provided an applicable advisory opinion. As a result, rational debt collectors would have an incentive to be overly aggressive in pursuing consumers, avoiding only those tactics that are clearly illegal. By contrast, if the bona fide error defense is construed narrowly – that is, as applying to clerical errors, but not to legal errors – debt collectors will be limited to lawful collection tactics, as Congress intended.

The incentives created by the Sixth Circuit's expansive interpretation of the bona fide error defense also undermine Congress's intent that consumers protect their own rights under the FDCPA. S. REP. NO. 95-382, at 5 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1695, 1699 (FDCPA is "primarily self-enforcing"). Consumers can only enforce their rights if they are aware that the rights have been violated in the first place, and the typical consumer – who is frequently not represented by counsel, *see Thomas v. Law Firm of Simpson & Cybak*, 392 F.3d 914, 918 (7th Cir. 2004) (en banc) (noting that "many debtors cannot afford to hire attorneys to represent them in [FDCPA] collection actions") – is unlikely to detect a violation that occurs as a result of a legal error. For example, although consumers may be able to recognize a random clerical error (such as being charged an interest rate of one hundred, rather than ten, percent), the same consumers are unlikely to

recognize that, as in this case, they are not actually required to dispute a debt "in writing."

2. Holding That The Bona Fide Error Defense Does Not Extend To Legal Errors Protects Consumers Without Putting Debt Collectors Who Refrain From Abusive Practices At A Competitive Disadvantage.

a. In holding that the FDCPA's bona fide error defense applied to legal errors, the Sixth and Tenth Circuits reasoned that a contrary holding would place an undue burden on debt collectors, thereby conflicting with the Act's goal of "ensuring that those debt collectors who refrain from abusive collection practices are not competitively disadvantaged." Pet. App. 14a (discussing 15 U.S.C. § 1692(e)); *see Johnson*, 305 F.3d at 1123. This concern is unfounded for two reasons. First, the reasoning has it exactly backwards: expanding the defense would place debt collectors who comply with the law at a competitive disadvantage compared to more aggressive debt collectors who violate the law but nonetheless would not be held liable for FDCPA violations as long as their actions were not clearly illegal.

Second, the statutory cap on damages significantly limits a debt collector's exposure to liability when he violates the FDCPA as a result of a legal error. *See* 15 U.S.C. § 1692k(a). In a case brought by an individual, a debt collector would be liable for no more than a thousand dollars over the consumer's actual damages, while damages in a class action are limited to actual damages plus the lesser of $500,000 or one percent of the net worth of the

debt collector. Moreover, actual damages are rarely awarded; when they are, they are generally less than five thousand dollars unless aggravating circumstances are present.[2] As a result, victims of abusive collection practices generally receive little more than the reasonable attorney fees ordinarily awarded to successful plaintiffs under "primarily self-enforcing" statutes like the FDCPA. *See* S. REP. NO. 95-382, at 5 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1695, 1699.

To the extent that there is any tension between a debt collector's exposure to liability for unintentional legal errors and consumer protection under the FDCPA, the statute's remedial nature dictates that it should be resolved in the consumer's favor. As this Court has reasoned in the context of consumer protection, it is not "unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 393 (1965) (internal citations omitted); *accord Russell v. Equifax A.R.S.*, 74 F.3d 30, 35 (2d Cir. 1996). For precisely this reason, courts of appeals have concluded that "it is logical for debt

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[2] *See, e.g., Sweetland v. Stevens & James, Inc.*, 563 F. Supp. 2d 300 (D. Me. 2008) ($2500); *Lowe v. Elite Recovery Solutions, L.P.*, No. CIV S-07-0627 RRB GGH, 2008 WL 324777 (E.D. Cal. Feb. 5, 2008) ($2740); *Baruch v. Healthcare Receivable Mgmt., Inc.*, No. 05-CV-5392 CPS JMA, 2007 WL 3232090 (E.D.N.Y. Oct. 29, 2007) (unreported) ($5000); *Langley v. Check Game Solutions, Inc.*, No. 05-CIV-2265 W AJB, 2007 WL 2701345 (S.D. Cal. Sept. 13, 2007) ($91); *Tallon v. Lloyd & McDaniel*, 497 F. Supp. 2d 847 (W.D. Ky. 2007) ($55).

collectors – repeat players likely to be acquainted with the legal standards governing their industry – to bear the brunt of the risk." *Clark v. Capital Credit & Collection Servs., Inc.*, 460 F.3d 1162, 1171 (9th Cir. 2006).

b. Nor would holding that the bona fide error defense does not apply to legal errors create the "absurd result" prophesied by the Sixth Circuit in this case – *viz.*, that attorney debt-collectors will be subject to liability for a violation of the FDCPA merely because they brought a collection action that ultimately proved unsuccessful. *Contra* Pet. App. 10a-11a. As this Court has explained, although Section 1692e(5) of the FDCPA prohibits debt collectors from threatening "'to take action that cannot legally be taken' . . . the fact that a lawsuit turns out ultimately to be unsuccessful" does not dictate the conclusion that it was an "action that cannot legally be taken." *Heintz v. Jenkins*, 514 U.S. 291, 296 (1995) (quoting 15 U.S.C. § 1692e(5)); *cf. Hughes v. Rowe*, 449 U.S. 5, 14 (1980) ("[E]ven if the law or the facts are somewhat questionable or unfavorable at the outset of litigation, a party may have an entirely reasonable ground for bringing suit."). Instead, an attorney debt-collector who filed an unsuccessful suit would be liable under Section 1692e(5) only if the claim was so devoid of merit that it was illegal to bring it at all. *See, e.g., Martsolf v. JBC Legal Group, P.C.*, No. 1:04-CV-1346, 2008 U.S. Dist. LEXIS 6876 (M.D. Pa. Jan. 30, 2008) (defendant violated FDCPA when it sent consumer a letter threatening litigation after statute of limitations expired). Indeed, this interpretation has been borne out in practice: petitioner has been unable to locate a

single case in which an attorney debt-collector has ever been liable under the FDCPA for merely bringing a claim that rested on a legally sound basis but was ultimately unsuccessful on the facts.

Nor does this Court's decision in *Heintz* support an extension of the bona fide error defense to legal mistakes, *see* Pet. App. 8a–9a, as the language on which the Tenth and Sixth Circuits relied was offered merely as a solution to a hypothetical problem. In *Heintz*, this Court explained that "even if we were to assume that the suggested reading of [Section] 1692e(5) is correct," it would not lead to a result "so absurd as to warrant implying an exception for litigating lawyers" from the FDCPA, because such attorneys could rely on the bona fide error defense. The Court did not squarely address whether – much less determine that – a legal mistake was covered by the bona fide error defense; to the contrary, to the extent that the issue was addressed at all either in briefs or at oral argument, the parties and *amici* operated on the assumption that the defense applied only to clerical errors.[3] *See Trouble Spots*, *supra*, at

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3 *See* Brief for Commercial Law League of America as *Amicus Curiae* Supporting Petitioners at 32, *Heintz v. Jenkins*, 514 U.S. 291 (1995) (No. 94-367), 1995 WL 18239 ("[T]he bona fide error defense . . . will not be available if the attorney commits an error of law . . . ."); Transcript of Oral Argument at 17-18, *Heintz v. Jenkins*, 514 U.S. 291 (1995) (No. 94-367), 1995 WL 117619 (petitioner's argument) ("Your honor, the good faith exception that you have just mentioned has been very narrowly construed by the lower courts. Consequently, it is basically, as they interpret it in any event, a defense that allows for clerical errors provided the business enterprise has sufficient safeguards . . . .").

817 ("In *Heintz*, the Supreme Court did not conclude that lawyers could use the bona fide error defense for legal mistakes. It merely observed that lawyers who mistakenly brought a lawsuit were not helpless in the face of the statutory defense, but the Court did not pause long enough to explain whether it was referring to both legal and nonlegal grounds.").

* * *

When it drafted legislation to protect consumers from abusive debt collectors, Congress included a bona fide error defense using language that had been uniformly interpreted to apply only to unintentional clerical errors and other random mistakes. That narrow construction reflects Congress's intent to protect consumers, as well as debt collectors who decline to test the boundaries of abusive practices. Absent explicit language from Congress, extending the FDCPA bona fide error defense to debt collectors who are wrong about the law would be both an unusual and unfair construction of a strict-liability consumer protection statute.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

PETITIONER'S APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 07-3964

KAREN L. JERMAN, PLAINTIFF-APPELLANT

v.

CARLISLE, MCNELLIE, RINI, KRAMER & ULRICH LPA;
ADRIENNE S. FOSTER, DEFENDANTS-APPELLEES.

[Argued: June 11, 2008
Filed: Aug. 18, 2008]

Before: SILER and COLE, Circuit Judges;
CLELAND, District Judge*

OPINION

COLE, Circuit Judge:

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* The Honorable Robert H. Cleland, United States District Judge for the Eastern District of Michigan, sitting by designation.

Plaintiff Karen L. Jerman filed an action challenging the debt-collection practices of the law firm Carlisle, McNellie, Rini, Kramer & Ulrich ("Carlisle"), and Adrienne S. Foster, an attorney employed by Carlisle, (collectively, "Defendants"). Jerman claims that Defendants violated the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692-92p, when they used allegedly deceptive forms to notify her of a foreclosure on her home. More specifically, Jerman claims that Defendants violated the FDCPA by representing to Jerman that her debt would be assumed valid unless she disputed the debt "in writing" even though the FDCPA does not require a *written* dispute. The district court granted Defendants' motion for summary judgment, concluding that, although Defendants violated the FDCPA by instructing Jerman that she must dispute the debt in writing, Defendants qualified for the FDCPA bona fide error defense, 15 U.S.C. § 1692k(c). On appeal, Jerman asserts that the defense is not available. For the following reasons, we affirm.

I. BACKGROUND

On April 17, 2006, Defendants filed a complaint in the Ashtabula County Court of Common Pleas on behalf of their client, Countrywide Home Loans, Inc., the holder of a mortgage interest in real property owned by Jerman. The complaint, handled by Foster, sought foreclosure on that property. Attached to the complaint was a "Notice Under the Fair Debt Collection Practices Act" (hereafter, "Validation Notice") which provided, among other things, that "the debt described herein will be assumed to be valid by the creditor's law firm [Carlisle] unless the debtor(s) . . . within thirty (30) days after receipt of

this notice, dispute, in writing, the validity of the debt or some portion thereof." The Validation Notice was dated, included Defendants' contact information, and provided the amount of debt and interest at issue along with the relevant Note and Mortgage. On April 20, 2006, Jerman was served by certified mail with the summons and complaint, which included the Validation Notice attachment. Defendants had no further communication with Jerman.

On April 25, 2006, Defendants received a letter from Edward A. Icove, Jerman's attorney, indicating that Jerman disputed the debt alleged in the complaint. On April 26, 2006, Defendants requested verification of the debt from Countrywide. On May 4, 2006, Countrywide notified Defendants that the note had been paid in full. On May 5, 2006, Defendants sent a judgment entry dismissing the complaint to the court of common pleas for filing, and mailed a copy of the judgment entry to Icove. The judgment entry was filed with the court on May 11, 2006.

On June 7, 2006, Jerman filed a complaint seeking certification as a class action and statutory damages, on the ground that Defendants violated the FDCPA by representing erroneously that a debt will be assumed valid absent a written dispute. Defendants filed a motion to dismiss the complaint on September 22, 2006, arguing that the words "in writing" in the Validation Notice did not violate the FDCPA. The district court denied that motion on November 21, 2006, finding that the Validation Notice violated the FDCPA because it compelled debtors to dispute the debt in writing when the FDCPA imposes no such requirement. *Jerman v. Carlisle*, 464 F. Supp. 2d 720, 725 (N.D. Ohio 2006).

After discovery, Defendants moved for summary judgment, arguing that: (1) the foreclosure complaint was not an "initial communication," which is necessary before debtor "validation rights can be triggered" under the FDCPA; (2) Defendants' alleged mistake as to the written-dispute requirement was unintentional and resulted from a bona fide error; and (3) Defendants are absolutely immune from liability because their actions represented an "integral part of the judicial process." The district court granted Defendants' motion on June 20, 2007, concluding that, although the foreclosure complaint was an initial communication triggering rights under the FDCPA and that Defendants violated the FDCPA by instructing Jerman that she must dispute the debt in writing, Defendants were shielded from liability by the bona fide error defense. *Jerman v. Carlisle*, 502 F. Supp. 2d 686, 696 (N.D. Ohio 2007).

Jerman timely filed a notice of appeal on July 19, 2007.

II. ANALYSIS

On appeal, Jerman argues that (1) the district court erred in concluding that the FDCPA's bona fide error defense may apply to mistakes of law,[1] and (2) even if the defense does apply to mistakes of law, the district court erred in concluding that Defendants were entitled to summary judgment on the defense, because a question of fact remains as to whether Defendants maintained procedures

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[1] Both parties agree that the underlying issue – the written-dispute requirement – rests on a question of law.

reasonably calculated to avoid the violation.[2] We review de novo a district court's grant of summary judgment. *Miller v. Admin. Office of the Courts*, 448 F.3d 887, 893 (6th Cir. 2006). Summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of proving that there are no genuine issues of material fact, *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986), and the party opposing the motion must then "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

A. Applicability of the FDCPA's Bona Fide Error Defense to Mistakes of Law

A debt collector may avoid liability for an FDCPA violation under the Act's bona fide error defense, which provides:

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[2] Jerman also "presents" two other issues on appeal: (1) whether a foreclosure complaint constitutes an "initial communication" under § 1692g(a) of the FDCPA; and, if so, (2) whether the words "in writing" in a validation notice violate § 1692g(a)(3). However, the district court found in favor of Jerman on these issues, and Jerman simply reiterates that the district court "got it right." Defendants did not cross-appeal the rulings on these issues, but address them "in the event the Court is inclined to review [them]." Because neither party is actually appealing these rulings, we do not address them.

> A debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

15 U.S.C. § 1692k(c). The issue of whether this defense applies to mistakes of law, in addition to procedural or clerical errors, is one of first impression for this Court.

Jerman argues that *Smith v. Transworld Sys., Inc.*, 953 F.2d 1025 (6th Cir. 1992) is instructive. *Smith* recognized that the bona fide error defense protects a debt collector from liability resulting from a clerical error. *Id.* at 1034 (holding that although collection agency's second collection letter, mailed shortly after receiving consumer's cease-communication assist letter, violated the FDCPA, the agency was shielded under the bona fide error defense because its procedures were reasonably adapted to avoid any such error). Thus, *Smith* is not relevant to the instant matter because it indisputably involved a clerical error; moreover, the panel majority did not address whether the bona fide error defense also applies to mistakes of law. *See id.* Although Judge Krupansky, concurring in part and dissenting in part, opined that "the bona fide error defense applies only to clerical errors," *id.* at 1034, his statement is simply dicta and does not serve as precedent.

Further, the district courts in this circuit are split. *Compare Dunaway v. JBC & Assoc., Inc.*, No.

03-73597, 2005 WL 1529574, at *6 (E.D. Mich. June 20, 2005) (citing *Smith* for the erroneous proposition that the Sixth Circuit "has explicitly held" that "the bona fide error defense applies only to clerical errors"), *and Edwards v. McCormick*, 136 F. Supp. 2d 795, 800 (S.D. Ohio 2001) (explaining that "were the mistake an error in legal judgment, it could not be erased by [the bona fide error defense]" and citing *Smith* for the proposition that the defense applies only to clerical errors), *with Miller v. Javitch, Block & Rathbone*, 534 F. Supp. 2d 772, 777 (S.D. Ohio 2008) (stating that the bona fide error defense "is applicable to mistakes of law as well as clerical errors" and finding defendant shielded by defense for an alleged mistake of law (citing *Delawder v. Platinum Fin. Serv. Corp.*, 443 F. Supp. 2d 942, 952 (S.D. Ohio 2005), which holds that the defense applies to debt-collection attorneys who unintentionally violate the FDCPA by asserting in good faith a legal claim that was later rejected by a court)); *Lee v. Javitch, Block & Rathbone, LLP*, No. 1:06-CV-585, 2007 WL 4591961, at * 1 (S.D. Ohio Dec. 28, 2007) (noting *Smith,* and circuit split, but explaining that recent and more persuasive case authority has permitted the defense for mistakes of law as well as fact); *Kelly v. Great Seneca*, 443 F. Supp. 2d 954, 960 (S.D. Ohio 2005) ("FDCPA liability is not imposed for good faith mistakes or errors of law or mathematics."); *and Taylor v. Luper, Sheriff & Niedenthal Co., L.P.A.*, 74 F. Supp. 2d 761, 765 (S.D. Ohio 1999) ("There is nothing in the language of [the defense] which limits its application to clerical mistakes or ministerial errors.").

Courts outside of this Circuit are also divided as to whether the bona fide error defense applies to mistakes of law or is limited, as Jerman contends, to procedural or clerical errors. *See Johnson v. Riddle*, 305 F.3d 1107, 1121 n.14 (10th Cir. 2002) (collecting cases). Although the "majority view is that the defense is available for clerical and factual errors" only, "a growing minority of courts . . . have concluded that mistakes of law can be considered bona fide errors under section 1692k(c)." *Nielsen v. Dickerson*, 307 F.3d 623, 641 (7th Cir. 2002) (citations omitted).

The most recent appellate court to speak directly on this subject is the Tenth Circuit in *Johnson v. Riddle*. There, the court listed, and then rejected, the holdings from the Second, Eighth, and Ninth Circuits that the bona fide error defense does not apply to legal errors. *See Picht v. Jon R. Hawks, Ltd.*, 236 F.3d 446, 451 (8th Cir. 2001) (citing *Hulshizer v. Global Credit Servs., Inc.*, 728 F.2d 1037, 1038 (8th Cir. 1984)); *Pipiles v. Credit Bureau of Lockport, Inc.*, 886 F.2d 22, 27 (2d Cir. 1989); *Baker v. G.C. Servs. Corp.*, 677 F.2d 775, 779 (9th Cir. 1982). The court explained that those cases simply "dispense[d] with the issue by citing earlier cases back to the Ninth Circuit's decision in *Baker v. G.C. Services*." *Johnson*, 305 F.3d at 1122.The *Johnson* Court rejected the *Baker* analysis because "*Baker* rested its holding entirely upon the similarity of the FDCPA bona fide error defense to the 'nearly identical' bona fide error defense provided in the Truth in Lending Act ('TILA'), a provision uniformly interpreted to apply only to clerical errors and not to legal errors." *Id.*

(citations omitted).[3] The *Johnson* Court found the TILA analogy to be faulty:

> [The plaintiff] also analogizes the provision to a similar section in [TILA], 15 U.S.C. § 1640(c), which is limited to clerical mistakes and which does not include errors of judgment or law. But . . . the TILA bona fide error provision expressly defined bona fide errors as [including, but not limited to,] "clerical, calculation, computer malfunction and programming, and printing errors, except that an error of legal judgment with respect to a person's obligations under this subchapter is not a bona fide error."15 U.S.C. § 1640(c). The FDCPA provision does no such thing. This, along with the statutes' different purposes, distinguishes the two.

Id. at 1122-23 (quoting *Jenkins v. Heintz*, 124 F.3d 824, 832 n.7 (7th Cir. 1997)). The *Johnson* Court concluded that unlike TILA, "the plain language of

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[3] The bona fide error defense in the TILA provides:

> A creditor or assignee may not be held liable in any action brought under this section or section 1635 of this title for a violation of this subchapter if the creditor or assignee shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error. *Examples of a bona fide error include, but are not limited to, clerical, calculation, computer malfunction and programming, and printing errors, except that an error of legal judgment with respect to a person's obligations under this subchapter is not a bona fide error.*

15 U.S.C. § 1640(c) (emphasis added).

the FDCPA suggests no intent to limit the bona fide error defense to clerical errors. To the contrary, § 1692k(c) refers by its terms to any 'error' that is 'bona fide.' "*Id.* at 1123.The court next looked to legislative history, and found "no indication . . . that Congress intended this broad language to mean anything other than what it says." *Id.* (citing S. Rep. No. 95-382, at 3 ("A debt collector has no liability, however, if he violates the act in *any* manner . . . when such violation is unintentional and occurred despite procedures designed to avoid such violations."(emphasis added))).

The *Johnson* Court found further support in the Supreme Court's reasoning in *Heintz v. Jenkins*, 514 U.S. 291, 115 S. Ct. 1489, 131 L. Ed. 2d 395 (1995), which affirmed the Seventh Circuit's conclusion that the FDCPA applies to lawyers acting as debt collectors. We previously decided otherwise, based in part on our view that any other rule "automatically would make liable any litigating lawyer who brought, and then lost, a claim, against a debtor."*Heintz*, 514 U.S. at 295, 115 S. Ct. 1489 (citing *Green v. Hocking*, 9 F.3d 18, 21 (6th Cir. 1993)). As the *Johnson* Court explained, the *Heintz* Court agreed with *Green*'s premise, but found such fear insignificant in light of the bona fide error rule. *Id.*

> *Heintz* accepted for argument's sake the Sixth Circuit's view that any debt collection lawyer whose claim fails necessarily violates the FDCPA. However, the Court concluded that such a premise did not produce absurd results, because of the existence of the bona fide error defense rule. In other words, the Court apparently believed that the bona fide

> error defense would apply in at least a portion of the cases where the lawyer brought suit to collect an amount beyond that legally owed by the debtor. This reasoning at least suggests that the defense is available for mistakes of law, because presumably mistake of law may contribute to the reasons why some of the underlying debt collection procedures are lost.

Johnson, 305 F.3d at 1123. *See also Taylor v. Luper, Sheriff & Niedenthal Co.*, 74 F. Supp. 2d 761, 764 (S.D. Ohio 1999) (noting that, if mistakes of law were not protected by the bona fide error defense, ethical duty of zealous advocacy could require debt collecting lawyer to assert claims that would expose her to FDCPA liability).

After the *Johnson* holding, the Seventh Circuit, in *Nielsen*, 307 F.3d at 641, also rejected *Baker*'s TILA analogy and stated that "the FDCPA's provision does not expressly remove legal mistakes from the realm of errors that can be considered bona fide." The court cited its previous opinion, *Jenkins*, 124 F.3d at 832 n.7, which noted that "nothing in the language of the FDCPA bona fide error provision limits the reach of the defense to clerical errors and other mistakes not involving the exercise of legal judgment," but ultimately concluded that there was no evidence that the mistake at issue had in fact involved the exercise of any legal judgment. Nonetheless, the *Nielsen* Court assumed – "consistent with [its] observations in *Jenkins*" – that "a legal mistake can qualify as a bona fide error under the FDCPA," but it found the defense inapplicable

because the collector intended to contravene the applicable law of the circuit. *Id.* at 641.

Jerman argues that *Johnson* is incorrect and that the statutory language of the FDCPA supports the view that Congress intended the defense to apply only to clerical errors. Specifically, Jerman points to the last phrase of the defense-that the violation "resulted from a bona fide error notwithstanding the *maintenance of procedures* reasonably adapted to avoid any such error." 15 U.S.C. § 1692k(c) (emphasis added). In Jerman's view, "this language eliminates the ability of a debt collector attorney to escape FDCPA liability based upon a legal mistake" because, practically, it makes no sense that a collector can maintain procedures reasonably adapted to avoid mistakes of law.[4] Jerman further argues that the distinction between the language in the FDCPA and

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[4] As a preliminary matter, Defendants argue that we should not consider this argument because Jerman did not raise it in the district court. But Jerman did raise the issue of the bona fide error limitation in the district court. Simply because she states this same argument in a different way and supplies additional authority does not mean we cannot consider such argument. Jerman is not attempting to affect her "chances of victory merely by calculating at which level to better pursue [her] theory," nor is she attempting a "second shot" by presenting "back-up theories . . . mounted for the first time." *Estate of Quirk v. CIR*, 928 F.2d 751, 758 (6th Cir. 1991). Jerman is simply advancing additional authority and expanded rationale on appeal to support an argument that she articulated to the district court in the first instance. *See Matter of Walden*, 12 F.3d 445, 451 n.11 (5th Cir. 1994) (as to a statutory argument raised for the first time at oral argument on appeal, "because it is not a separate issue, and instead is simply additional legal authority to consider in reaching our decision, we consider it here").

TILA is inappropriate because when Congress passed the FDCPA in 1977, the TILA's bona fide statutory language did not provide explicitly the legal error exclusion, but had merely been interpreted as such. In other words, the two acts were then identical. It was not until 1980 that Congress revised the TILA and expressly excluded errors of law from the bona fide error defense. *See* Pub.L. No. 96-221.Therefore, Jerman argues, it is incorrect to compare the current versions of the TILA and the FDCPA: "By using the same language for the FDCPA [when it was enacted] in 1977 after [courts] construed that same language in the TILA to apply to clerical errors only, Congress gave that interpretation the force of the law." The *Johnson* Court considered and rejected this same argument:

> We acknowledge that it is more common to speak of procedures adapted to avoid clerical errors than to speak of procedures adopted to avoid mistakes of law. However, absent a clearer indication that Congress meant to limit the defense to clerical errors, we instead adhere to the unambiguous language of the statute as supported by the available legislative history.

Johnson, 305 F.3d at 1123.

We agree with the persuasive reasoning and analysis set forth in *Johnson*. Indeed, debt collectors may set up "procedures" more often to avoid clerical mistakes, but there is nothing unusual about attorney collectors maintaining procedures, such as frequent education and review of the FDCPA law, in order to avoid mistakes of law. Moreover, the fact that the TILA's bona fide error provision expressly

excludes errors of legal judgment while the analogous provision in the FDCPA does not have such limitation suggests that, unlike the TILA, Congress did not intend to limit the defense to clerical errors. Although the FDCPA was adopted when the TILA had identical language that courts had interpreted to exclude legal errors, the legislative history of the FDCPA shows that "a debt collector has no liability . . . if he violates the act in *any* manner . . . when such violation is unintentional and occurred despite procedures designed to avoid such violations." S. Rep. No. 95-382, at 5 (emphasis added). Further, Congress has amended the FDCPA several times since its enactment, and has never changed the language to exclude mistakes of law from the bona fide error defense. In addition, protection for attorneys who make bona fide errors of law is consistent with the FDCPA's purpose of eliminating abusive debt collection practices and ensuring that those debt collectors who refrain from abusive collection practices are not competitively disadvantaged. 15 U.S.C. § 1692(e).

B. Applicability of the FDCPA's Bona Fide Error Defense to Defendants' Mistake of Law

Holding that the FDCPA's bona fide error defense applies to mistakes of law, we now apply the defense to the specific facts of this case. To qualify for the bona fide error defense, a debt collector must prove by a preponderance of the evidence that: (1) the violation was unintentional; (2) the violation was a result of a bona fide error; and (3) the debt collector maintained procedures reasonably adapted to avoid any such error. *See, e.g., Lewis v. ACB Bus. Servs.,*

Inc., 135 F.3d 389, 402 (6th Cir. 1998). In doing so, "[t]he debt collector must only show that the violation was unintentional, not that the communication itself was unintentional." *Id.* On appeal, Jerman argues that there is a genuine issue of material fact regarding the third prong: whether Defendants maintained procedures reasonably adapted to avoid any legal error as to the written-dispute requirement.

The district court found to the contrary. We agree and conclude that Defendants, specifically through Richard McNellie, the senior principal and the attorney responsible for Defendants' compliance with the FDCPA, maintained procedures reasonably adapted to avoid legal error relating to the written-dispute requirement. After reviewing the record, we agree with the district court's conclusion that Defendants employed the following specific procedures to comply with the FDCPA and its "ever-changing" body of law:

> Defendant law firm has designated its senior principal, Richard McNellie, as the individual responsible for compliance with the FDCPA; McNellie regularly attends conferences and seminars that focus on FDCPA issues; the firm subscribes to "Fair Debt Collection," a part of "The Consumer Credit and Legal Practice Series," together with the supplements thereto; McNellie routinely distributes copies of cases relevant to the firm's practices and procedures to all attorneys at the firm; all new employees, attorneys and nonattorneys, are advised of the firm's obligations under the FDCPA and provided with the firm's FDCPA Procedures

> Manual, and encouraged to seek McNellie's advice with questions regarding the FDCPA; McNellie conducts a mandatory meeting at least twice a year for all available employees wherein FDCPA issues and developments are discussed . . . .

Jerman, 502 F. Supp. 2d at 695.

Jerman argues that Defendants have only shown that these procedures were in place when Jerman was served with the foreclosure complaint and Validation Notice. Jerman claims that the *legal error* took place when the original Validation Notice form was drafted in 1997, and that because Defendants only speak to the procedures in place in 2006 when the *violation* took place, they should lose on summary judgment. Jerman, however, fails to cite any legal authority to support her novel assertion that the court must distinguish between the procedures in place when the "error" (i.e., the drafting of the document) occurred and the procedures in place when the "violation" (i.e., the serving of the faulty document) occurred. In any event, Defendants testified that they relied on case law at the time the Validation Notice was drafted *and* when it was actually sent to Jerman.

Jerman further argues that had Defendants established any meaningful procedures they would have either (1) sought a formal advisory opinion from the Federal Trade Commission on the "in writing" requirement, or (2) adopted the model notice contained in the International Guide to the FDCPA of the American Collector's Association, which does not include the in writing requirement. Jerman's arguments fail. First, if seeking an advisory opinion

is the only "meaningful procedure" that can be adopted in order to avoid liability for bona fide legal errors under § 1692k(c), then the FDCPA's *separate* safe-harbor provision for collectors who act upon the advice of the Commission would be superfluous. *See* 15 U.S.C. § 1692k(e).[5] Because "a court should read the statute as a whole and avoid a construction that renders a statutory word superfluous," *Grable & Sons Metal Prods. v. Darue Eng'g & Mfg.*, 377 F.3d 592, 596-97 (6th Cir.2004), Jerman's argument is unpersuasive. Second, while it could be argued that adoption of the model language would be a better practice for Defendants, Jerman provides no support for her assertion that adopting the language is the only acceptable procedure to avoid legal error of this type. The bona fide error defense calls for maintenance of procedures reasonably adapted to avoid any such bona fide error. Here, Defendants demonstrated that considerable time, effort and research were spent in evaluating the validity of the "in writing" requirement. Defendants' compliance officer regularly attended FDCPA seminars, examined and distributed relevant case law, regularly held meetings, and encouraged open discussion of FDCPA issues. Further, after Defendants sent the Validation Notice, they continued to take reasonable and good faith steps, particularly through the firm's compliance

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[5] 15 U.S.C. § 1692k(e) provides: No provision of this section imposing any liability shall apply to any act done or omitted in good faith in conformity with any advisory opinion of the Commission, notwithstanding that after such act or omission has occurred, such opinion is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

department, to comply with the law. We, therefore, agree with the district court that the bona fide error defense appropriately applies in this case.

III. CONCLUSION

For the foregoing reasons, we **AFFIRM** the judgment of the district court.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

No. 1:06 CV 1397

KAREN L. JERMAN, PLAINTIFF

v.

CARLISLE, MCNELLIE, RINI, KRAMER & ULRICH LPA ET AL., DEFENDANTS-APPELLEES.

[Decided: June 20, 2007]

MEMORANDUM AND OPINION AND ORDER

GAUGHAN, District Judge:

INTRODUCTION

This matter is before the Court upon defendants' Motion for Summary Judgment (Doc. 23). For the following reasons, the motion is GRANTED.

FACTS

Plaintiff, Karen L. Jerman, filed this Class Action Complaint against defendants, Carlisle, McNellie, Rini, Kramer & Ulrich and Adrienne S. Foster. The Complaint alleges that on April 17, 2006, defendants filed a foreclosure action against plaintiff on behalf of Countrywide Home Loans, Inc. in the

Ashtabula County Court of Common Pleas. Attached to the state court complaint was a form Notice Under the Fair Debt Collection Practices Act (hereafter, the form validation notice), which provided, among other things, "the debt described herein will be assumed to be valid by the Creditor's law firm, unless the debtor(s), or either one of them, within thirty (30) days after receipt of this notice, dispute, in writing, the validity of the debt or some portion thereof."

The Complaint sets forth two claims. Count One alleges a violation of the federal Fair Debt Collection Practices Act (FDCPA). Count Two alleges a violation under the Ohio Consumer Sales Practices Act (OCSPA). Both claims are premised on the allegation that the form validation notice is defective in two ways. First, representing to consumers that the debt will be assumed valid unless *written* dispute has been made violates 15 U.S.C. § 1692g which provides:

> **§ 1692g. Validation of debts**
>
> (a) Notice of debt; contents
>
> Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing—
>
> (3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector.

15 U.S.C. § 1692g(a)(3). Second, failing to make clear that the 30 days given to dispute the debt does not alter the 28 day deadline to answer the complaint constitutes language that "overshadows or contradicts other language informing a consumer of her rights" and, thus, violates the FDCPA.

Upon agreement of the parties, defendants filed a motion to dismiss to resolve solely whether representing to consumers that debts will be assumed valid unless a written dispute is made is a violation of 15 U.S.C. § 1692g and/or Ohio Consumer Sales Practices Act, R.C. § 1345.01 *et seq.* Thereafter, this Court issued its Memorandum of Opinion and Order concluding that defendants' form validation notice violates the FDCPA in so far as it states that disputes must be made in writing.

Subsequently, plaintiff filed her Amended Class Action Complaint: Unfair Debt Collection Practices which sets forth one claim for relief, namely that defendants violated § 1692g(a)(3) of the FDCPA by representing to consumers that the debt will be assumed valid unless a written dispute has been made and defendants violated § 1692e(10) by using false, deceptive, and/or misleading means and/or representations in connection with the collection of any debt.

This matter is now before the Court upon defendants' Motion for Summary Judgment.

STANDARD OF REVIEW

Summary Judgment is appropriate when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23, 106 S.

Ct. 2548, 91 L.Ed.2d 265 (1986) (citing Fed. R. Civ. P. 56(c)); *see also LaPointe v. UAW, Local 600*, 8 F.3d 376, 378 (6th Cir. 1993). The burden of showing the absence of any such genuine issues of material facts rests with the moving party:

> [A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits," if any, which it believes demonstrates the absence of a genuine issue of material fact.

Celotex, 477 U.S. at 323, 106 S. Ct. 2548 (citing Fed.R.Civ.P. 56(c)). A fact is "material only if its resolution will affect the outcome of the lawsuit." *Anderson v. Liberty Lobby*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

Once the moving party has satisfied its burden of proof, the burden then shifts to the nonmoving party. Federal Rule of Civil Procedure 56(e) provides:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of [his] pleadings, but [his response], by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is genuine issue for trial. If he does not respond, summary judgment, if appropriate, shall be entered against him.

The court must afford all reasonable inferences and construe the evidence in the light most favorable to

the nonmoving party. *Cox v. Kentucky Dep't. of Transp.*, 53 F.3d 146, 150 (6th Cir. 1995) (citation omitted); *see also United States v. Hodges X-Ray, Inc.*, 759 F.2d 557, 562 (6th Cir. 1985). However, the nonmoving party may not simply rely on its pleading, but must "produce evidence that results in a conflict of material fact to be solved by a jury." *Cox*, 53 F.3d at 150.

Summary judgment should be granted if a party who bears the burden of proof at trial does not establish an essential element of his case. *Tolton v. American Biodyne, Inc.*, 48 F.3d 937, 941 (6th Cir. 1995) (citing *Celotex*, 477 U.S. at 322, 106 S. Ct. 2548). Accordingly, "the mere existence of a scintilla of evidence in support of plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Copeland v. Machulis*, 57 F.3d 476, 479 (6th Cir. 1995) (quoting *Anderson*, 477 U.S. at 252, 106 S. Ct. 2505 (1986)). Moreover, if the evidence is "merely colorable" and not "significantly probative," the court may decide the legal issue and grant summary judgment. *Anderson*, 477 U.S. at 249–50, 106 S. Ct. 2505 (citation omitted).

DISCUSSION

Defendants argue that they are entitled to summary judgment on three bases: (1) the foreclosure complaint was not an "initial communication" such as would trigger any rights under the FDCPA, (2) defendants' alleged mistake was unintentional and resulted from a bona fide error and (3) defendants are absolutely immune from liability because their

actions were nothing more than an integral part of the judicial process.

(1) whether the foreclosure complaint was an "initial communication"

Defendants submit the affidavit of defendant Adrienne S. Foster who avers the following. Ms. Foster is an associate with the law firm of Carlisle, McNellie, Rini, Kramer & Ulrich Co. L.P.A. She was assigned plaintiff's foreclosure matter at issue here. On April 20, 2006, plaintiff was served by certified mail with the foreclosure complaint which included the FDCPA validation notice. Foster had no other communication with plaintiff. On April 25, 2006, Foster received a correspondence from Attorney Edward A. Icove indicating that plaintiff disputed the debt alleged in the foreclosure complaint. On April 26, 2006, Foster contacted her client, Countrywide Home Loans, Inc., to obtain a verification of the debt. On May 4, 2006, Countrywide notified Foster that the loan had been paid in full. On May 5, 2006, Foster sent a judgment entry dismissing the foreclosure action to the Court for filing with a copy to Attorney Icove via facsimile. The judgment entry dismissing the foreclosure was filed with the Ashtabula County Court of Common Pleas on May 11, 2006. (Foster aff.)

Defendants argue that the foreclosure complaint did not constitute an initial communication under the FDCPA, thus triggering the validation rights under the Act.

Section 1692g(a) provides in relevant part:

(a) Notice of debt; contents

> Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing—
>
> (1) the amount of the debt;
>
> (2) the name of the creditor to whom the debt is owed;
>
> (3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;
>
> (4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and
>
> (5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

As such, before validation rights under § 1692g(a) can be triggered, there must be an "initial communication" on the part of the debt collector. Other than a contact with plaintiff on April 13, 2006

by a representative of defendants to verify plaintiff's address and telephone number, the first (and only) communication between defendants and plaintiff was the foreclosure complaint served on plaintiff on April 20, 2006. (Doc. 28 Ex. C) Defendants assert that this was not an "initial communication" as the term is defined by the FDCPA.

At the time plaintiff was served, there was no binding case law authority in the Sixth Circuit on the issue of whether a complaint and summons is an initial communication to collect a debt, but three Circuits had addressed the question without agreement. *See Goldman v. Cohen*, 445 F.3d 152 (2d Cir. 2006), *Thomas v. Law Firm of Simpson & Cybak*, 392 F.3d 914 (7th Cir. 2004) (6–4 decision) (Evans, J., dissenting) and *Vega v. McKay*, 351 F.3d 1334 (11th Cir. 2003). *Goldman* and *Thomas* held that a consumer debt collector's initiation of a lawsuit in state court seeking recovery of unpaid consumer debts is an "initial communication" within the meaning of the FDCPA and *Vega* held that a complaint does not constitute an initial communication.

Additionally, one district court in this Circuit noted in a footnote that a lawsuit initiated to collect a debt is an initial communication. *Sprouse v. City Credits*, 126 F. Supp. 2d 1083, n.8 (S.D. Ohio 2000).

Effective October 13, 2006, § 1692g of the FDCPA was amended to state:

> **(d) Legal pleadings**
>
> A communication in the form of a formal pleading in a civil action shall not be treated

> as an initial communication for purposes of subsection (a) of this section.

This amendment was added after plaintiff was served with the foreclosure complaint herein. Nevertheless, defendants argue that it expresses the intent of Congress that a civil pleading is not to be considered an initial communication. Plaintiff contends that the amendment only affects a "formal pleading in a civil action" after its enactment (October 13, 2006), and confirms that pleadings were included in the definition of "communication."

For the following reasons, this Court disagrees with defendants that the foreclosure complaint was not an initial communication.

In *Goldman*, the most recently decided case, the Second Circuit determined that a consumer debt collector's initiation of a lawsuit in state court seeking recovery of unpaid consumer debts is an "initial communication" within the meaning of the FDCPA based on several considerations, including the following which this Court finds persuasive.

First, the plain language of the FDCPA broadly defines the term "communication" as "the conveying of information regarding a debt directly or indirectly to any person through any medium." 15 U.S.C. § 1692a(2). Recognizing the general rule that the plain meaning of legislation should be conclusive, except in the rare cases in which the literal application of a statute would produce a result demonstrably at odds with the intentions of its drafters, the court concluded that the plain meaning of the FDCPA is "entirely consistent with Congress's goal of preventing what it characterized as 'serious and

widespread' debt collection abuses." In that regard, the court surmised that "any construction of the FDCPA that exempted state legal proceedings from the definition of 'initial communication' would permit debt collectors to avoid the validation notice requirements of the statute simply by collecting debts through the medium of litigation."

Second, the court pointed out that the Supreme Court held in *Heintz v. Jenkins*, 514 U.S. 291, 115 S. Ct. 1489, 131 L. Ed. 2d 395 (1995), that the FDCPA's term "debt collector" includes lawyers who regularly try to collect payment of consumer debts through legal proceedings and concluded that "the [FDCPA] applies to attorneys who 'regularly' engage in consumer-debt-collection activity, even when that activity consists of litigation." Additionally, the court noted that Congress has since amended another section of the FDCPA to clarify that certain disclosure requirements (other than those specified in § 1692g(a)) do not apply to a formal legal pleading made in connection with a legal action. The court concluded that that section's express exclusion of a legal pleading from the scope of the term communication implies the drafters' understanding that the term "communication" would otherwise include legal pleadings.

Finally, the court stated that the Eleventh Circuit's decision of *Vega*, *supra*, reaching the opposite conclusion, relied upon a Staff Commentary of the Federal Trade Commission which had been superseded. The *Goldman* court stated, "A Commission advisory opinion issued in March 2000 explicitly repudiated that Staff Commentary in light of the Supreme Court's decision in *Heintz*, and held

that a formal legal pleading which conveyed information about a debt would indeed constitute a communication within the scope of the FDCPA."

Likewise, *Thomas*, *supra*, held that a law firm's service of a summons and complaint, filed in the state court against a debtor, was an initial communication within the meaning of the FDCPA and, therefore, triggered an obligation, under 15 U.S.C. § 1692g(a), to timely notify the debtor of his validation rights. The court, like *Goldman*, looked to the FDCPA's broad definition of a "communication," concluding that it encompasses the service of a summons and complaint. The court stated that its interpretation of the statute supports its intention to "protect consumers from a host of unfair, harassing, and deceptive debt collection practices" by helping to ensure that debtors will be informed about their validation rights and that debt collectors, knowing that they are obliged to advise debtors of these rights, will investigate claims before initiating litigation to collect debts. Moreover, the court reasoned that not including service of pleadings in the definition of "communication" would "erode the § 1692g requirement to inform debtors of their validation rights; debt collectors could avoid their obligation to advise debtors of their validation rights altogether by initiating litigation." Additionally, the court recognized that while Congress excepted pleadings from the definition of "communication" in § 1692e(11), no such pleadings exception exists in § 1692g. Finally, the *Thomas* court also pointed out that *Vega*, which reached the contrary result, relied on a FTC commentary which had been replaced by an opinion stating that an attorney debt collector's

service of a court document conveying information about a debt is a FDCPA communication. A dissent was filed in *Thomas* which concluded that including the filing of a summons and complaint in the definition of communication runs counter to the intent of the statute.

Based on the weight of the authority at the time plaintiff herein was served with the summons and complaint, the foreclosure complaint was an initial communication triggering rights under the FDCPA.

(2) whether defendants are entitled to the bona fide error defense

Next, defendants argue they are nevertheless entitled to judgment as a matter of law based on the FDCPA's bona fide error defense which provides:

> A debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

15 U.S.C. § 1692k(c).

A "debt collector must only show that the violation was unintentional, not that the communication itself was unintentional." *Lewis v. ACB Business, Services, Inc.*, 135 F.3d 389, 402 (6th Cir. 1998).

Defendants assert that the bona fide error defense applies to mistakes of law, as occurred here,[1] as well as clerical errors. Plaintiff disagrees and asserts that a mistake of law is not a bona fide error. For the following reasons, this Court finds that a mistake of law can form a bona fide error defense.

As one court has recognized,

> There is a split of authority among the circuits as to whether the bona fide error defense applies to mistakes of law. The majority view is that the defense is only available for clerical and factual errors. *See, e.g., Picht v. Jon R. Hawks, Ltd.*, 236 F.3d 446, 451–52 (8th Cir. 2001); *Pipiles v. Credit Bureau of Lockport, Inc.*, 886 F.2d 22, 27 (2nd Cir. 1989); *Baker v. G.C. Servs. Corp.*, 677 F.2d 775, 779 (9th Cir. 1982).

Nielsen v. Dickerson, 307 F.3d 623 (7th Cir. 2002). That court also pointed out, however, that "a growing minority of courts TTT have concluded that mistakes of law can be considered bona fide errors under § 1692k(c)." *Id.* In particular, *Johnson v. Riddle*, 305 F.3d 1107 (10th Cir. 2002), held that the bona fide error defense is applicable to mistakes of law and collected the cases finding the same.

As for the Sixth Circuit, plaintiff relies on the decision of *Smith v. Transworld Systems, Inc.*, 953 F.2d 1025 (6th Cir. 1992), which recognized that the bona fide error defense protects a debt collector from liability due to a clerical error. The case undoubtedly

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[1] It is not disputed that this matter rests on a mistake of law.

involved a clerical error. The majority of the court in that decision did not address whether the bona fide error defense applied to mistakes of law as well as clerical errors. Rather, plaintiff cites to the statement of Judge Krupansky, who concurred in part and dissented in part, that "the bona fide error defense applies only to clerical errors." Judge Krupansky did not analyze the issue but merely cited to *Baker v. G.C. Servs. Corp.*, *supra*. Nonetheless, as *Nielsen*, *supra*, recognized:

> The Ninth Circuit's opinion in *Baker*, the first appellate precedent on this point, looked principally to the cases that had uniformly construed the Truth–in–Lending Act's ("TILA") bona fide error provision . . . not to immunize legal errors. The TILA provision, however, expressly states that 'an error of legal judgment with respect to a person's obligations under this subchapter is not a bona fide error.' It also includes an illustrative list of errors that would constitute bona fide errors, including 'clerical, calculation, computer malfunction and programming, and printing errors.' By contrast, the FDCPA's provision does not expressly remove legal mistakes from the realm of errors that can be considered bona fide, nor does it in any other way illustrate what types of mistakes can or cannot be deemed bona fide.

The "growing majority of courts" finding that mistakes of law can be considered bona fide errors note this distinction between the two statutory

provisions. *See,* for example, *Johnson v. Riddle, supra*:

> Of the cases which hold that the defense does not apply to mistakes of law, almost all dispense with the issue by citing earlier cases back to the Ninth Circuit's decision in *Baker v. G.C. Servs. Corp., [supra] Baker* rested its holding entirely upon the similarity of the FDCPA bona fide error defense to the 'nearly identical' bona fide error defense provided in the [TILA], a provision uniformly interpreted to apply only to clerical errors and not to legal errors. However, the TILA analogy is faulty, as the Seventh Circuit has explained:
>
> > [The plaintiff] also analogizes the provision to a similar section in [TILA] which is limited to clerical mistakes and which does not include errors of judgment or law. But . . . the TILA bona fide error provision expressly defined bona fide errors as [including, but not limited to,] 'clerical, calculation, computer malfunction and programming, and printing errors, except that an error of legal judgment with respect to a person's obligations under this subchapter is not a bona fide error.' The FDCPA provision does no such thing. This, along with the statutes' different purposes, distinguishes the two.
>
> *Jenkins v. Heintz*, 124 F.3d 824, 832 n.7 (7th Cir. 1997). Unlike TILA, the plain language of the FDCPA suggests no intent to limit the

> bona fide error defense to clerical errors. To the contrary, § 1692k(c) refers by its terms to any 'error' that is 'bona fide.' We find no indication in the legislative history that Congress intended this broad language to mean anything other than what it says.

Id. at 1122–1123.

This Court agrees with this reasoning and, accordingly, finds that the bona fide error defense applies to mistakes of law.[2]

To qualify for the bona fide error defense, defendants must make three showings under § 1692k(c): (1) that the presumed FDCPA violation was not intentional; (2) that the presumed FDCPA violation resulted from a bona fide error; and (3) that it maintained procedures reasonably adapted to avoid any such error. *Kort v. Diversified Collection Services, Inc.*, 394 F.3d 530, 537 (7th Cir. 2005) (citation omitted).

(a) whether the presumed FDCPA violation was not intentional

Defendants assert that the violation was unintentional, and made in good faith, because at the time the form validation notice was sent to plaintiff

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[2] Plaintiff further argues that even if a mistake of law could qualify as a bona fide error defense, defendants chose to ignore the plain language of § 1692g(a)(3) which contains no writing requirement for a dispute of a debt and the numerous case decisions outside this Circuit which hold that a dispute need not be in writing. However, the language is not so plain as evidenced by the law generated regarding its interpretation. Moreover, the case law in this Circuit had not concluded that the "in writing" requirement violated the statute.

the only Sixth Circuit case law on this issue held that the use of the words "in writing" does not violate section 1692g(a)(3). Defendants point to *Diamond v. Corcoran*, No. 5:92–CV–36, 1992 U.S. Dist. LEXIS 22793, 5–6 (W.D.Mich.1992) and *Savage v. Hatcher*, 109 Fed. Appx. 759, 762 (6th Cir. 2004), affirming *Savage v. Hatcher*, No. C–2–01–0089, 2002 WL 484986 (S.D. Ohio 2002). Richard McNellie, the senior principal of Carlisle, McNellie, Rini, Kramer & Ulrich, avers that it was his understanding that the use of the words "'in writing' was sanctioned in this Judicial District pursuant to the ruling in *Graziano v. Harrison*, 950 F.2d 107 (3rd Cir. 1991), which was cited with approval in *Diamond v. Corcoran*." (McNellie aff. ¶ 9).

Defendants assert that *Diamond* and *Savage* were the only decisions in the Sixth Circuit to provide guidance on the issue. Moreover, defendants contend, because there was a split of authority among the other Circuit courts, defendants could only speculate as to what would constitute a proper validation notice.

Defendants further assert that they have also made a good faith effort to comply with the FDCPA and its "ever-changing" body of law as evidenced by McNellie's averments: Defendant law firm has designated its senior principal, Richard McNellie, as the individual responsible for compliance with the FDCPA; McNellie regularly attends conferences and seminars that focus on FDCPA issues; the firm subscribes to "Fair Debt Collection," a part of "The Consumer Credit and Legal Practice Series," together with the supplements thereto; McNellie routinely distributes copies of cases relevant to the firm's

practices and procedures to all attorneys at the firm; all new employees, attorneys and nonattorneys, are advised of the firm's obligations under the FDCPA and provided with the firm's FDCPA Procedures Manual, and encouraged to seek McNellie's advice with questions regarding the FDCPA; McNellie conducts a mandatory meeting at least twice a year for all available employees wherein FDCPA issues and developments are discussed; the Validation Notice at issue contained the words "in writing" because it was McNellie's understanding that such language was sanctioned in this Judicial District pursuant to *Diamond* and *Graziano*, *supra.* and other applicable case law. (McNellie aff.)

Plaintiff asserts McNellie's averments that he adopted the "in writing" requirement based on his belief of the status of the law show that his actions were intentional. Plaintiff also points to Ms. Foster's deposition testimony that she relied on McNellie and, therefore, acted intentionally. This Court agrees with defendants, however, that while the communication may have been intentional, there is no issue of fact, based on McNellie's averments, as to whether defendants intentionally violated the FDCPA. As discussed below, the law was unsettled on this issue and little guidance was provided by the Sixth Circuit.

As this Court recognized in its previous Opinion, at the time this communication was sent, the majority of district courts disagreed with the Third Circuit's decision in *Graziano* which held that a consumer's dispute of a debt must be in writing to be effective. Notwithstanding, the Sixth Circuit's only (unreported) decision on the issue affirmed the district court's finding that a form validation notice

did not violate § 1692g despite its requirement that a dispute of the debt must be in writing, although the court did not specifically mention the "in writing" controversy or refer to *Graziano*. *See Savage v. Hatcher*, 109 Fed. Appx. 759 (6th Cir. 2004). In December 2005, the Ninth Circuit decided *Camacho v. Bridgeport Financial, Inc.*, 430 F.3d 1078 (9th Cir. 2005), which held that a debt collector's notice violates the FDCPA in so far as it states that disputes of validity of debts must be in writing. *Camacho* expressly disagreed with *Graziano*. *Camacho*, however, was not binding precedent in this Circuit and appeared to conflict with case law in this Circuit. While this Court also noted two district court opinions which agreed with *Camacho* (*Baez v. Wagner & Hunt, P.A.*, 442 F. Supp. 2d 1273 (S.D. Fla. 2006) and *Turner v. Shenandoah Legal Group, P.C.*, 2006 WL 1685698 (E.D. Va. June 12, 2006)), neither decision was issued prior to the sending of the communication herein.

Accordingly, because the statute was not unambiguous and the law was not settled (and appeared to even favor defendants in this Circuit), defendants' violation was not intentional.

(b) whether the presumed FDCPA violation resulted from a bona fide error

Plaintiff argues that defendants' mistake was not made in good faith. The Court disagrees.

Plaintiff points to McNellie's deposition testimony that he had not been aware of the Camacho decision until the present action was filed. Nonetheless, the Ninth Circuit's decision would not

have compelled defendants to have changed their form validation notice.

Plaintiff also argues that while defendants relied on *Savage* in their Motion to Dismiss, McNellie's deposition testimony shows that he did not consider *Savage* in creating the form validation notice and his affidavit states that he relied only upon *Graziano* and *Diamond*. Defendants cited *Savage* in their Motion to Dismiss, however, merely to support their argument that their form validation notice did not violate the FDCPA.

Plaintiff points to McNellie's deposition testimony that this Court's previous Opinion is still open to further judicial review. This does not show that defendants acted in bad faith when they sent the form validation notice. In fact, the Sixth Circuit has still not decided the issue.

Plaintiff additionally points to McNellie's deposition testimony regarding his rationale for rejecting an oral dispute mechanism, which plaintiff asserts demonstrates bad faith. Nonetheless, as defendants argue, McNellie's decision to include the words "in writing," regardless of the rationale, was not contrary to existing Sixth Circuit law.

Plaintiff contends that attorney Foster did not act in good faith because she relied on McNellie and did not conduct any independent investigation on the issue. Nonetheless, at the time, the law in this Circuit on the issue was not clear.

Finally, plaintiff claims that defendants could have requested an advisory opinion from the Federal Trade Commission, thereby ensuring that they acted in good faith. However, defendants were not

obligated to do so and the issue herein is not whether defendants should have insulated themselves from liability but whether they acted in good faith.

For these reasons, the Court finds the presumed FDCPA violation resulted from a bona fide error.

(c) whether defendants maintained procedures reasonably adapted to avoid any such error

Plaintiff argues that defendants have not produced or described any procedures reasonably adapted to avoid their violation of the FDCPA. Although their written procedures are contained in the FDCPA manual, McNellie admitted at deposition that the manual does not prevent the specific violation in this case. Nor, plaintiff asserts, did McNellie articulate any reasonable procedure to review his legal interpretation of § 1692g, or show that any document was prepared to support his interpretation. Plaintiff also points out that since this case was filed, the "in writing" requirement has been omitted from defendants' form validation notice.

Defendants point to McNellie's averments that he regularly attended seminars dealing with FDCPA issues, reviewed and distributed relevant case law, conducted regular meetings and encouraged open discussion of FDCPA issues. Defendants assert that plaintiff's argument that formal memorandum should have been prepared imposes an "unreasonable" and "overly burdensome" procedure on defendants. This Court agrees that given the unsettled law that existed on this issue, no procedure could have lead defendants to know that this Court would find an FDCPA violation in the validation notice sent to plaintiff.

For these reasons, the Court finds that defendants qualify for the bona fide error defense.

(3) whether defendants are absolutely immune from liability because their actions were an integral part of the judicial process

Defendants argue that attorney Foster's action in serving the foreclosure complaint was acting in her function as an advocate and is, thus, an integral part of the judicial process entitled to absolute immunity. This Court disagrees.

Courts have found that law firms acting as debt collectors are subject to the FDCPA and may not avoid liability by asserting common law litigation immunity. Recently, for example, the Fourth Circuit rejected such a defense stating, "The statutory text makes clear that there is no blanket common law litigation immunity from the requirements of the FDCPA." *Sayyed v. Wolpoff & Abramson*, 485 F.3d 226 (4th Cir. May 9, 2007). The court further noted that the FDCPA's bona fide error defense provision

> offers a kind of qualified immunity to debt collectors, protecting actions which otherwise are covered by the statute but arose from bona fide error and were not intentional violations. Such a provision supplies an additional argument against implying immunities as to which the statute is silent: Congress addressed the issue of immunity expressly and extended it only so far as [the bona fide error defense provision] provides.

Id. The Court agrees with this reasoning and finds that defendants are not entitled to absolute immunity.

CONCLUSION

For the foregoing reasons, defendant's Motion for Summary Judgment is granted.

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 07-3964

KAREN L. JERMAN, PLAINTIFF-APPELLANT

v.

CARLISLE, MCNELLIE, RINI, KRAMER & ULRICH LPA, ET AL., DEFENDANTS-APPELLEES.

[Filed: Nov. 24, 2008]

Before: SILER and COLE, Circuit Judges; and CLELAND, *District Judge

ORDER

This court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel. The

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* Hon. Robert H. Cleland, United States District Judge for the Eastern District of Michigan, sitting by designation.

panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

OPPOSITION BRIEF

FILED
JUN 8 - 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 08-1200

In The Supreme Court of the United States

KAREN L. JERMAN,

Petitioner,

v.

CARLISLE, MCNELLIE, RINI, KRAMER & ULRICH, L.P.A. AND ADRIENNE S. FOSTER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a debt collector's legal error qualifies for the bona fide error defense under the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692.

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INTRODUCTION

The facts of this case are straightforward. A law firm/debt collector sent a "validation notice" to a debtor. The debtor sued for FDCPA violations. The district court determined that the "validation notice violate[d] the FDCPA in so far as it state[d] that disputes [of a debt] must be made in writing." Thereafter, the law firm/debt collector asserted the bona fide error defense. The district court granted summary judgment to the law firm, which was affirmed by the Sixth Circuit. Petitioner seeks further review claiming that there is a "circuit split" over the issue of whether the bona fide error defense applies to mistakes of law or merely clerical errors.

The Petition presents no sound basis for this Court to exercise jurisdiction. Contrary to Petitioner's argument, the federal courts are not "deeply divided" and "irreconcilably entrenched" over whether the bona fide error defense in the FDCPA applies to mistakes of law. Indeed, only two federal circuit courts (i.e., the Eighth and Ninth) have held that the bona fide error defense does not excuse good faith legal mistakes. Both of these decisions are, however, in excess of twenty-five years old and contain little to no analysis of the pertinent issues.

Meanwhile, in their recent decisions, the Sixth and Tenth Circuits have thoroughly examined the plain language of the statute, the legislative history of the Act and, unlike the Eighth and Ninth Circuits, have provided clear and rational bases for their

holdings. In fact, the decisions of the Sixth and Tenth Circuits are so persuasive that what was once a "growing minority" of federal courts is now becoming the "clear majority."

Accordingly, because the federal courts are already headed in the right direction on this issue, the question presented for review by Petitioner does not require this Court's time and attention, let alone the parties' resources.

STATEMENT OF THE CASE

1. While the purpose of the FDCPA is to stop abusive debt collection practices, it was not meant to punish ethical attorneys/debt collectors who refrained from abusive practices. Nor was it meant to punish attorneys/debt collectors who rely, in good faith, on case law that is later "independently examined" and ultimately rejected by another court. The fact that the FDCPA was not intended to be a strict liability statute is highlighted by its legislative history. As noted by the Tenth Circuit in *Johnson v. Riddle*, 305 F.3d 1107 (10th Cir. 2002), "[i]n describing the bona fide error exception, the Senate Report stated: 'A debt collector has no liability . . . if he violates the act *in any manner, including with regard to the act's coverage*, when such violation is unintentional and occurred despite procedures designed to avoid such violations.'" *Id.* at 1123 (citing S.Rep. No. 95-382 at

5). Moreover, when the FDCPA was passed, Senator Donald Riegle of Michigan explained that its purpose was "to protect consumers from a host of unfair, harassing, and deceptive debt collection practices *without imposing unnecessary restrictions on ethical debt collectors.*" *Pressley v. Capital Credit & Service, Inc.*, 760 F.2d 922, 925 (9th Cir. 1985) (citing 123 Cong. Rec. S. 27, 386 (daily ed. Aug. 5, 1977)) (emphasis added).

2. Consistent with this express purpose, Congress included a bona fide error defense. "Bona fide" is a Latin term literally meaning "in good faith," and is defined as an act made "without fraud and deceit." Black's Law Dictionary 168 (7th ed. 1999). Neither the express language of the FDCPA nor its legislative history suggest in any manner that the bona fide error defense is only limited to clerical errors.

3. On April 17, 2006, Respondents, on behalf of a lender, filed a state court foreclosure action against Petitioner. Petitioner was served with a summons, complaint and validation notice in accordance with § 1692g(a) of the FDCPA. The validation notice stated that the debt would be assumed valid unless the debtor, within 30 days, disputed "in writing" the validity of the debt. At the time the validation notice was sent, every court within the Sixth Circuit that had considered the requirements for a validation notice under § 1692g(a) had ruled that inclusion of the words "in writing" did not constitute a violation of the FDCPA. *See Diamond v. Corcoran*,

No. 5:92-CV-36, 1992 U.S. Dist. LEXIS 22793, 5-6 (W.D.Mich. 1992); *Savage v. Hatcher*, 109 Fed.Appx. 759, 762 (6th Cir. 2004), *affirming Savage v. Hatcher*, No. C-2-01-0089, 2002 WL 484986 (S.D.Ohio 2002).

On April 25, 2006, Respondents received a letter from Petitioner's attorney disputing the validity of the debt. Upon further review, it was determined that the debt, in fact, had been paid in full. Respondents immediately dismissed the foreclosure complaint. The complaint was pending for a total of twenty-four days.

4. On June 7, 2006, Petitioner filed a class action complaint for "unlawful debt collection practices." The class action complaint was predicated on the "form validation notice" that had been sent to Petitioner as part of the foreclosure action. Petitioner's complaint alleged that Respondents violated her rights, as well as those of the class (i.e., all Ohio consumers who have received a form validation notice on or after June 6, 2005) by:

> Representing to consumers that the debt will be assumed valid unless a written dispute has been made in violation of 15 U.S.C. § 1692g. *Camacho v. Bridgeport Financial, Inc.*, 430 F.3d 1078 (9th Cir. 2005).

Petitioner sought by way of class action relief: (1) actual damages; (2) the lesser of either $500,000 or one percent of the debt collector's net worth; and (3) attorney fees.

On September 22, 2006, Respondents filed a motion to dismiss the complaint on the basis that

their inclusion of the two words, "in writing," in the notice did not violate the FDCPA pursuant to *Diamond* and *Savage*. Petitioner, relying on the recent Ninth Circuit decision in *Camacho*, argued the exact opposite. On November 21, 2006, the district court decided to "independently examine this issue" in light of the lack of a determinative ruling by the Sixth Circuit on the matter. Res. App. at 8. In its independent examination, the district court agreed with and adopted the reasoning in *Camacho,* finding that "the plain meaning of the statute is clear and unambiguous, subsection (a)(3) does not impose a writing requirement on consumers. Accordingly, this Court will not insert a writing requirement into the statute." Res. App. at 11. The district court ultimately determined that the law firm's form validation notice violated the FDCPA insofar as it stated that disputes must be made in writing. *Id.*

5. On March 1, 2007, Respondents filed a motion for summary judgment on the "bona fide error" defense under § 1692k(c) of the FDCPA. Petitioner opposed the motion on the basis that the bona fide error defense applied only to clerical errors and not to mistakes of law. On June 20, 2007, the district court granted Respondents' motion finding "that the bona fide error defense applies to mistakes of law," and that Respondents qualified for the defense by establishing all three elements under § 1692k(c). Pet. App. at 34a-40a.

On August 18, 2008, the Sixth Circuit affirmed the trial court's ruling. While acknowledging that the

circuit courts are "divided," the Sixth Circuit noted that courts taking a contrary position have failed to thoroughly examine the relevant issues but instead have "simply dispense[d] with the issue by citing earlier cases back to the Ninth Circuit's decision in *Baker v. G.C. Services*."[1] Pet. App. at 8a (citing *Johnson*, 305 F.3d at 1122). *Baker*, in turn, "rested its holding entirely upon" a faulty analogy between the bona fide error defenses contained in the FDCPA and the Truth in Lending Act ("TILA"). *Id.*

7. In summary, Petitioner first urged the district court to follow the growing minority of cases that refused to insert a writing requirement into the FDCPA. Once the district court adopted that position, Petitioner then urged the district court to disregard the growing minority of cases and insert the words "clerical errors only" into the bona fide error defense of the FDCPA.

REASONS FOR DENYING THE PETITION

I. Federal Courts Are Not "Deeply Divided" Or "Irreconcilably Entrenched" Over Whether The Bona Fide Error Defense In The FDCPA Applies To Mistakes Of Law.

1. Contrary to Petitioner's claims, only two circuit courts, the Eighth and Ninth, have held that

[1] *Baker v. G.C. Services Corp.*, 677 F.2d 775 (9th Cir. 1982).

the FDCPA's bona fide error defense does not apply to mistakes of law. *See Baker v. G.C. Services Corp.*, 677 F.2d 775 (9th Cir. 1982) and *Hulshizer v. Global Credit Servs., Inc.*, 728 F.2d 1037 (8th Cir. 1984). Although the Second Circuit in *Pipiles v. Credit Bureau of Lockport, Inc.*, 886 F.2d 22 (2nd Cir. 1989) cited to *Baker* and *Hulshizer* for the proposition that the bona fide error defense does not apply to mistakes of law, the statement is nothing more than *dicta*. *Id.* at 27. Indeed, the *Pipiles* Court raised the issue of the bona fide error defense *sua sponte*, noting that the defendant "did not plead a section 1692k(c) defense in its answer, or argue it on appeal." *Id.* Consequently, although the Second Circuit recognized the holdings in *Baker* and *Hulshizer* almost twenty years ago, it has never ruled on the issue.

Meanwhile, although the Eighth and Ninth Circuits have held that the bona fide error defense does not apply to mistakes of law, these decisions are over twenty-five years old, and fail to consider the plain language of the statute, its purpose and legislative history. Rather, as noted by both the Sixth and Tenth Circuits, while *Baker* "rested its holding entirely upon" a faulty analogy between the bona fide error defenses contained in the FDCPA and TILA, other courts following suit have "simply dispense[d] with the issue by citing earlier cases back to . . . *Baker*. . . ." Pet. App. at 8a (citing *Johnson*, 305 F.3d at 1122). Simply, with the Sixth Circuit's adoption of the Tenth Circuit's holding in *Johnson*, along with the numerous district courts that have followed suit,

Baker is no longer the "majority" view. In fact, no circuit court in almost twenty-five years has followed *Baker*.

Moreover, the Seventh Circuit has twice recognized in *dicta* that there is nothing limiting the FDCPA's bona fide error defense to clerical errors. *See Nielsen v. Dickerson*, 307 F.3d 623, 641 (7th Cir. 2002) (although the court held that the alleged error was clerical rather than legal, it nonetheless rejected the TILA analogy stating "that nothing in the language of the FDCPA's bona fide error provision limits the reach of the defense to clerical errors and other mistakes not involving the exercise of legal judgment."); *see also Jenkins v. Heintz*, 124 F.3d 824, 832 n.7 (7th Cir. 1997).

2. Petitioner argues that certiorari is warranted because the circuit split is "considered" and "entrenched." Respectfully, the circuit split is far short of entrenched at present. Indeed, given the movement of federal courts in the direction of the holdings of the Sixth and Tenth Circuits, reconsideration by the Eighth and Ninth Circuits is not out of the question.

Petitioner has suggested that the Eighth District is irreconcilably entrenched because *Picth v. John R. Hawks, Ltd.*, 236 F.3d 446 (8th Cir. 2001) reaffirmed its prior decision in *Hulshizer*. Such an assertion, however, is without merit for two reasons. First, the *Picht* Court, like the court in *Hulshizer*, "simply dispense[d] with the issue by citing earlier cases back to . . . *Baker*. . . ." Pet. App. at 8a (citing *Johnson*, 305

F.3d at 1122). In other words, the *Picht* Court, like the *Hulshizer* Court before it, completely failed to analyze the bona fide error defense or any of the relevant issues.

Second, the Eighth Circuit decided *Picht* in 2001 without the benefit of the Tenth Circuit's decision in *Johnson*, which was not decided until 2002. As a result, it is very likely that the Eighth and Ninth Circuits will ultimately follow the growing majority of federal courts on this issue. In that event, the overstated conflict between the circuits will be resolved without the necessity of this Court's intervention.

3. Petitioner also argues that current economic conditions make the existing conflict particularly untenable as consumer complaints are bound to increase. Even assuming Petitioner is correct (although no statistical data was presented to support her claim), the lower federal courts are already moving in the right direction based on the sound reasoning provided in *Johnson*. As to the potential for an increase in complaints under the FDCPA, Judge Barrett's recent observations in *Miller v. Javitch, Block & Rathbone*, 534 F.Supp.2d 772, 778-779 (S.D.Ohio 2008) are timely and instructive:

> As a district court in the Second Circuit recently noted "[t]he interaction of the least sophisticated consumer standard with the presumption that the FDCPA imposes strict liability has led to a proliferation of litigation." *Jacobson*, 434 F.Supp.2d at 138. The court in *Jacobson* continued:

Ironically, it appears that it is often the extremely sophisticated consumer who takes advantage of the civil liability scheme defined by this statute, not the individual who has been threatened or misled. The cottage industry that has emerged does not bring suits to remedy the "widespread and serious national problem" of abuse that the Senate observed in adopting the legislation, 1977 U.S.C.C.A.N. 1695, 1696, nor to ferret out collection abuse in the form of "obscene or profane language, threats of violence, telephone calls at unreasonable hours, misrepresentation of a consumer's legal rights, disclosing a consumer's personal affairs to friends, neighbors, or an employer, obtaining information about a consumer through false pretense, impersonating public officials and attorneys, and simulating legal process." *Id.* Rather, the inescapable inference is that the judicially developed standards have enabled a class of professional plaintiffs. . . .

It is interesting to contemplate the genesis of these suits. The hypothetical Mr. Least Sophisticated Consumer ("LSC") makes a $400 purchase. His debt remains unpaid and undisputed. He eventually receives a collection letter requesting payment of the debt which he rightfully owes. Mr. LSC, upon receiving a debt collection letter that contains some minute variation from the statute's requirements, immediately exclaims "This clearly runs afoul of the FDCPA!" and-rather than simply pay what he owes-repairs to his lawyer's office to vindicate a perceived

> "wrong." "[T]here comes a point where this Court should not be ignorant as judges of what we know as men." *Watts v. State of Ind.*, 338 U.S. 49, 52, 69 S.Ct. 1347, 1349, 93 L.Ed. 1801 (1949).
>
> *Id.* at 138-39 (emphasis added). We echo *Jacobson's* sentiments and concerns. [The plaintiff] fits the description of *Jacobson's* hypothetical consumer to a tee, and we will not "countenance lawsuits based on frivolous misinterpretations or nonsensical assertions of being led astray." *Id.* at 138.

Miller, 534 F.Supp.2d at 778-779 (quoting *Fed. Home Loan Mortg. Corp. v. Lamar*, 503 F.3d 504, 514 (6th Cir. 2007), in turn quoting *Jacobson v. Healthcare Fin. Servs.*, 434 F.Supp.2d 133, 138 (E.D.N.Y. 2006)).

Judge Barrett ultimately found that "[o]bviously, the Defendants (attorney-collectors) have a vested interest in not violating the FDCPA as counsel for Plaintiff has sued [them] at least ten times in this district alone for such violations. The Court finds that Defendants are entitled to the bona fide error defense under 15 U.S.C. § 1692k(c)."[2] *Miller*, 534 F.Supp.2d at 778.

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[2] The error in *Miller* was a mistake of law, not clerical.

II. The Sixth Circuit's Decision Is Correct On The Merits.

A. Congress Did Not Intend To Limit The Bona Fide Error Defense To Clerical Errors.

1. Nothing In The Plain Language Of § 1692k(c) Limits The Bona Fide Error Defense To Clerical Errors Only.

Section 1692k(c) of the FDCPA provides:

> A debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

Petitioner argues that the language and structure of the FDCPA's bona fide error defense demonstrates that Congress did not intend for it to apply to mistakes of law. In other words, ignoring both the legislative history and elementary canons of statutory interpretation, Petitioner wants to have her proverbial cake and eat it too. On the one hand, at Petitioner's urging, the district court denied Respondents' motion to dismiss finding that it would be improper to insert the words "in writing" into the plain and unambiguous language of § 1692g(a)(3). Res. App. at 11. On the other hand, limiting the application of the bona fide error defense in the

manner urged by Petitioner would require inserting the words "clerical errors only" into the plain and unambiguous language of § 1692k(c).

Nevertheless, it is a well established principle of statutory interpretation that "[w]hen the statute's language is plain, the sole function of the courts-at least where the disposition required by the text is not absurd-is to enforce it according to its terms." *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6 (2000), in turn quoting *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989), in turn quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)). *Simply, given the number of federal courts that have specifically determined that the FDCPA's bona fide error defense applies to mistakes of law, it cannot be reasonably argued that the result of such an interpretation is "absurd."* Further, had Congress intended to restrict the bona fide error defense to clerical errors, it could have done so by amending the statute at some point over the past thirty years, just as it amended the bona fide error defense in TILA in 1980.

2. The Bona Fide Error And Safe Harbor Defenses Are Not Mutually Exclusive.

1. Petitioner contends that given the safe harbor provision in the FDCPA, it is "unlikely" Congress intended to permit the bona fide error defense to

apply to mistakes of law. Petitioner's argument, however, is based on the premise that there are relatively few cases in which the FDCPA is genuinely ambiguous. This premise is false. For example, in this case alone there were several provisions of the FDCPA that required clarification by the courts, namely: (1) whether a complaint is an initial communication under § 1692g(a); (2) whether the words "in writing" violate § 1692g(a)(3); and (3) whether the bona fide error defense applies to mistakes of law under § 1692k(c). Moreover, in Petitioner's initial complaint, she also raised the issue of whether the validation notice violated § 1692g because it "overshadowed" the summons, i.e., the validation notice allegedly failed to make clear that the thirty day timeframe for disputing the debt provided for by the FDCPA did not alter the twenty-eight day state court deadline to file an answer to the complaint.[3]

To require attorneys/debt collectors to forego a claim or to seek a formal opinion from the Federal Trade Commission ("FTC") every time an ambiguity arises in connection with the FDCPA, even if several courts may have already addressed a particular issue, would not only be impractical and cost prohibitive, but would also place ethical attorneys/debt collectors

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[3] The "overshadowing" claim was voluntarily withdrawn upon Petitioner's closer examination of the language of the validation notice.

at a substantial competitive disadvantage in contravention of the express purpose of the Act.

Here, for example, Respondents would have been required to seek as many as four separate formal opinions from the FTC prior to enforcing the lender's mortgage rights. Meanwhile, during the time it took to obtain an FTC opinion, the debt collector would have absolutely no ability to protect its interest in the mortgaged property. This is particularly troublesome in foreclosure actions where time is of the essence and any delay can result in the value of the asset being substantially diminished.

2. Petitioner also asserts that permitting the bona fide error defense to apply to mistakes of law would eviscerate the safe harbor provision. Again, this argument is not well taken. Common sense alone dictates that the two provisions are not mutually exclusive, but rather can and should work hand-in-hand. While attorneys/debt collectors can seek to insulate themselves under the safe harbor provision when there is little or no case law guidance, or where they have failed to maintain reasonable procedures adapted to avoid errors, the bona fide error provision provides a more practical and cost effective safeguard. The defense allows ethical attorneys/debt collectors to defend against liability when their debt collection practices are not abusive and an unintentional mistake was made in the face of reasonable procedures in place to avoid the error. The safe harbor provision notwithstanding, finding that the

bona fide error defense applies to mistakes of law is not an "absurd" result. *Lamie*, 540 U.S. at 534.

Further, in granting summary judgment, Judge Gaughan implicitly found that application of the bona fide error defense to mistakes of law and the safe harbor provision are not mutually exclusive:

> [Petitioner] claims that [Respondents] could have requested an advisory opinion from the Federal Trade Commission, thereby ensuring that they acted in good faith. However, *[Respondents] were not obligated to do so* and the issue herein is not whether [Respondents] should have insulated themselves from liability but whether they acted in good faith.

Pet. App. at 38a-39a (emphasis added).

3. Next, Petitioner argues that if the bona fide error defense applies to legal mistakes, then aggressive debt collectors will be permitted to escape liability whenever there is no clear precedent. Petitioner's argument, however, ignores the fact that § 1692k(c) is an affirmative defense, and does not excuse mistakes, whether clerical or legal, unless the attorney/debt collector can prove by a preponderance of the evidence: "(1) that the presumed FDCPA violation was not intentional; (2) that the presumed FDCPA violation resulted from a bona fide error; and (3) that it maintained procedures reasonably adapted to avoid any such error." Pet. App. at 34a (citing *Kort v. Diversified Collecion Services, Inc.*, 394 F.3d 530,

537 (7th Cir. 2005). Accordingly, aggressive attorneys/ debt collectors can no more rely on the bona fide error defense for an intentional bad faith legal mistake than they could for an intentional bad faith clerical error.

4. Finally, Petitioner contends that the bona fide error defense should not apply to mistakes of law because it is more "common" to speak of procedures adapted to avoid clerical rather than legal errors. More common or not, the Tenth Circuit properly rejected this argument stating that "absent a clearer indication that Congress meant to limit the defense to clerical errors, we instead adhere to the unambiguous language of the statute as supported by the available history." *Johnson,* 305 F.3d at 1123. Again, it is a fundamental principle of statutory interpretation that "[w]hen the statute's language is plain, the sole function of the courts-at least where the disposition required by the text is not absurd-is to enforce it according to its terms." *Lamie*, 540 U.S. at 534.

Moreover, in addressing this same argument, the Sixth Circuit pointed out that "there is nothing unusual about attorney collectors maintaining procedures, such as frequent education and review of the FDCPA law, in order to avoid mistakes of law." Pet. App. at 13a. In other words, although it may be more common to speak in terms of procedures adapted to avoid clerical errors in connection with non-attorney debt collectors, there is absolutely nothing illogical about attorney collectors maintaining procedures reasonably adapted to avoid legal mistakes.

3. The Legislative History Of The FDCPA Shows That When Congress Enacted The Statute, It Did Not Intend To Adopt The Existing Judicial Interpretations Of TILA's Bona Fide Error Defense.

Petitioner claims that because the bona fide error defense in the FDCPA is identical to the one Congress originally enacted in TILA, Congress intend to incorporate the existing judicial interpretations of TILA's bona fide error provision into the FDCPA. In making this argument, Petitioner relies on the recent case of *Rowe v. N.H. Motor Transp. Ass'n*, 128 S. Ct. 989 (2008), wherein the Court stated that "when judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its judicial interpretations as well." *Id.* at 994. The problem with Petitioner's argument, however, is that it completely overlooks the intent of Congress as expressed in the legislative history of the FDCPA.

In *Rowe*, the Supreme Court, in interpreting the pre-emption provision in Federal Aviation Administration Authorization Act of 1994, adopted its previous judicial interpretation of a similar provision in the Airline Deregulation Act of 1978. *Id.* at 994. In doing so, however, the Court noted that when Congress copied the language of the pre-emption provision, it did so fully aware of the Supreme Court's prior interpretation of that language. *Id.* Indeed,

according to the *Rowe* Court, the legislative history showed that Congress specifically expressed its agreement with "the broad preemption interpretation adopted by the United States Supreme Court" relative to the Airline Deregulation Act of 1978. *Id.* at 995.

In this case, a review of the legislative history of the FDCPA does not show that Congress, in enacting the statute in 1977, was aware of the existing judicial interpretations of the bona fide error defense in TILA, or that it intended for the two provisions to be interpreted in the same manner. In fact, the legislative histories of the FDCPA and TILA show just the opposite.

Relative to the bona fide error defense in TILA, a review of the statute's legislative history, as noted by Petitioner, shows that "Congress . . . added the bona fide error defense only to address complaints from businessmen and others that 'mathematical and clerical errors' were 'inevitable' in the lending process." Petition at p. 18 (citing *Ratner v. Chemical Bank N.Y. Trust Co.*, 329 F.Supp. 270 (S.D.N.Y. 1971)). On the other hand, the legislative history of the FDCPA, which Petitioner completely ignores, shows that Congress did not intend to adopt the narrow judicial interpretations of the bona fide error defense in TILA. As the Tenth Circuit found in *Johnson*:

> Unlike TILA, the plain language of the FDCPA suggests no intent to limit the bona fide error defense to clerical errors. To the

> contrary, § 1692k(c) refers by its terms to any "error" that is "bona fide." We find no indication in the legislative history that Congress intended this broad language to mean anything other than what it says. Indeed, to the extent that the legislative history speaks to this issue, it suggests that the narrow reading advocated by [the plaintiff] is incorrect. In describing the bona fide error exception, the Senate Report stated: "A debt collector has no liability, however, if he violates the act *in any manner, including with regard to the act's coverage,* when such violation is unintentional and occurred despite procedures designed to avoid such violations" S.Rep. No. 95-382, at 5.

Johnson, 305 F.3d at 1123.

Although § 1692k(c) does not specifically state that the bona fide error defense applies to mistakes of law, the legislative history of the FDCPA clearly shows that Congress intended its application to be much broader than under TILA.

Further, if it was the intent of Congress that mistakes of law be excluded from the FDCPA, then it has had over thirty years to amend the FDCPA accordingly, just as it amended TILA in 1980. Indeed, just like TILA, the FDCPA has undergone numerous amendments since it was first enacted in 1977, yet Congress has not changed the language to specifically exclude legal mistakes.

B. The Issue Is Not Whether A Narrow Reading Of The Bona Fide Error Defense Is Consistent With The Purpose Of The FDCPA.

1. The attempts by Petitioner to construe the intent of Congress and the purpose of the FDCPA are entirely irrelevant. The issue is not whether a narrow reading of the bona fide error defense is consistent with the purpose of the FDCPA, nor whether a broad reading is inconsistent. Rather, the only issue is whether a reading of the plain language of § 1692k(c) produces "absurd" results when legal mistakes are applied to the bona fide error defense. *Lamie*, 540 U.S. at 534. As indicated, given the number of federal courts that have already found that the FDCPA's bona fide error defense applies to mistakes of law, it cannot be reasonably argued that the results of such an interpretation are "absurd."[4] Accordingly, contrary to Petitioner's assertions, it is of absolutely no consequence whether a narrow reading of the bona fide error defense is consistent with the FDCPA's purposes.

2. There is also no merit to Petitioner's claim that a reading of the plain language of the bona fide error defense to include mistakes of law frustrates

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[4] Indeed, an absurd result would be to subject the attorneys/debt collectors here to class action damages and attorney fee exposure because they made a judgment based upon existing law that turned out to be incorrect in retrospect after Judge Gaughan's decision on the motion to dismiss.

the purpose of the FDCPA. While Petitioner is correct that the purpose of the FDCPA is to protect consumers against debt collection abuses, Petitioner ignores the fact that in so doing, Congress did not intend to punish ethical attorneys/debt collectors who pursue collections in good faith. Congress expressly stated in the FDCPA that in addition to protecting consumers, it also intended "to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged. . . ." 15 U.S.C. § 1692(e); *see also Pressley*, 760 F.2d at 925 (according to the legislative history, the FDCPA's purpose is "to protect consumers . . . without imposing unnecessary restrictions on ethical debt collectors.").

Petitioner argues that the bona fide error defense was not intended to apply to legal mistakes because "the FDCPA draws a clear line between proscribed and acceptable debt collection practices," and because "[d]ebt collectors know their obligation, and consumers know their rights." Petition at p. 20. Petitioner asserts that applying the bona fide error defense to mistakes of law will encourage attorneys/debt collectors to be "overly aggressive" because they can escape liability whenever the law is unsettled.

Once again the problem with Petitioner's argument is that attorneys/debt collectors, whether overly aggressive or not, cannot simply escape liability because the law is unsettled. Rather, as already discussed *supra* in Section II.A.3, the bona fide error provision in the FDCPA is an affirmative defense,

requiring proof, by a preponderance of the evidence, that the mistake was unintentional and made in good faith notwithstanding the maintenance of reasonable procedures to avoid the error. Pet. App. at 34a (citing *Kort*, 394 F.3d at 537). Thus, just as an attorney/debt collector cannot employ "overly aggressive" tactics and escape liability for clerical errors, an attorney/debt collector cannot escape liability simply by showing that the law is unsettled. Certainly, in this context, there is nothing illogical, inconsistent or absurd about the bona fide error defense including mistakes of law.

3. Petitioner also contends that holding attorneys/debt collectors strictly liable for violations of the FDCPA will not unduly burden them because there is a statutory cap on damages. This argument is simply disingenuous, as shown by the facts of this case alone. Petitioner, who incurred no actual damage as a result of the filing of the foreclosure action, filed a class action complaint subjecting Respondents to significant exposure of up to $500,000 or one percent of their net worth, plus attorney fees. The statutory cap on damages in the context of a class action is hardly a light burden or solace to ethical attorneys/debt collectors.

4. Next, Petitioner advances the position that eliminating mistakes of law from the bona fide error defense will not "create the 'absurd result' prophesied by the Sixth Circuit in this case – *viz.*, that attorney debt-collectors will be subject to liability for a violation of the FDCPA merely because they brought

a collection action that ultimately proved unsuccessful." Petition at p. 24. Again, Petitioner has missed the point. The issue is not whether eliminating mistakes of law from the bona fide error defense will produce "absurd" results, but instead whether a reading of the plain language of the statute as not limiting the bona fide error defense to clerical errors will produce "absurd" results.

Finally, Respondents will not be so presumptuous as to tell this Court what its intent was in *Heintz v. Jenkins*, 514 U.S. 291 (1995). Instead, Respondents would simply note that, at the very least, the Court hinted at the fact that the bona fide error defense applies to mistakes of law when it found that a litigating lawyer who brings, and then loses, a claim against a debtor is not automatically liable under the FDCPA because:

> [T]he Act says explicitly that a "debt collector" may not be held liable if he "shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." § 1692k(c).

Id. at 295.

Debating this Court's intent in *Heintz,* however, is not necessary because a reading of the plain language of § 1692k(c) to include legal mistakes does not produce "absurd" results.

* * *

In summary, the Petition presents no sound basis for this Court to exercise jurisdiction. Contrary to Petitioner's argument, the federal courts are not "deeply divided" or "irreconcilably entrenched" over whether the bona fide error defense in the FDCPA applies to mistakes of law. Further, the plain language of the FDCPA and legislative history of the Act suggest no intent to limit the bona fide error defense to clerical errors.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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June 8, 2009

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Karen L. Jerman,	**CASE NO. 1:06 CV 1397**
Plaintiff,	**JUDGE PATRICIA A. GAUGHAN**
vs.	
Carlisle, McNellie, Rini, Kramer & Ulrich, et al.,	**Memorandum of Opinion and Order**
Defendants.	(Filed Nov. 22, 2006)

Introduction

This matter is before the Court upon defendants' Motion to Dismiss. This case alleges a violation of the federal Fair Debt Collection Practices Act. For the following reasons, the motion is DENIED.

Facts

Plaintiff, Karen L. Jerman, filed this Class Action Complaint against defendants, Carlisle, McNellie, Rini, Kramer & Ulrich and Adrienne S. Foster. The Complaint alleges that on April 17, 2006, defendants filed a foreclosure action against plaintiff on behalf of Countrywide Home Loans, Inc. in the Ashtabula County Court of Common Pleas. Attached to the state court complaint was a form Notice Under the Fair Debt Collection Practices Act (hereafter, the form validation notice), which provided, among other things, "the debt described herein will be assumed to

be valid by the Creditor's law firm, unless the debtor(s), or either one of them, within thirty (30) days after receipt of this notice, dispute, in writing, the validity of the debt or some portion thereof."

The Complaint sets forth two claims. Count One alleges a violation of the federal Fair Debt Collection Practices Act (FDCPA). Count Two alleges a violation under the Ohio Consumer Sales Practices Act (OCSPA). Both claims are premised on the allegation that the form validation notice is defective in two ways. First, representing to consumers that the debt will be assumed valid unless *written* dispute has been made violates 15 U.S.C. § 1692g. Second, failing to make clear that the 30 days given to dispute the debt does not alter the 28 day deadline to answer the complaint constitutes language that "overshadows or contradicts other language informing a consumer of her rights" and, thus, violates the FDCPA.

The parties' August 22, 2006 Report of Parties' Planning Meeting states, "The parties agree that defendants will file a motion to dismiss on whether representing to consumers that debts will be assumed valid unless a written dispute is made is a violation of 15 U.S.C. § 1692g and/or Ohio Consumer Sales Practices Act, R.C. § 1345.01 *et seq.*, and that these are the only issues before the Court."

Accordingly, this matter is before the Court upon defendants' Motion to Dismiss. The sole issue before the Court is whether defendants violated the FDCPA

and/or OCSPA by representing that a debt will be assumed valid unless a written dispute is made.

Standard of Review

When considering a motion to dismiss plaintiff's complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the allegations of the complaint must be taken as true and construed liberally in favor of plaintiff. *Lawrence v. Chancery Court of Tenn.*, 188 F.3d 687 (6th Cir. 1999). The complaint is only to be dismissed if the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41 (1957), *Hammond v. Baldwin*, 866 F.2d 172 (6th Cir. 1989). However, the complaint must set forth "more than the bare assertion of legal conclusions. *In Re DeLorean Motor Co.*, 991 F.2d 1236, 1240 (6th Cir. 1993); *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988).

Discussion

The FDCPA provides in pertinent part:

§ 1692g. Validation of debts

(a) Notice of debt; contents

Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer

> has paid the debt, send the consumer a written notice containing –
>
> (3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector.

15 U.S.C. § 1692g(a)(3).

Plaintiff asserts that defendants violated this section by misrepresenting plaintiff's rights in the disclosure statement that Congress requires debt collectors to provide when they begin collecting a debt. Plaintiff asserts that defendants altered the substance of the disclosure that § 1692g(a)(3) requires. In particular, while the statute imposes no restriction on whether a dispute may be conveyed orally or in writing, the form validation notice sent by defendants expressly limited plaintiff to disputing a debt in writing. Plaintiff argues that this alteration of the statutory disclosure violates the FDCPA.

Defendants argue that plaintiff's FDCPA claim fails because the Sixth Circuit held in *Savage v. Hatcher*, 109 Fed. Appx. 759 (6th Cir. 2004), that a form validation notice requiring that a dispute of a debt be in writing does not violate the FDCPA. Plaintiff argues that this Court should not follow *Savage*. For the following reasons, this Court agrees that *Savage* does not compel dismissal of the Complaint.

The district court's opinion in *Savage* recites the debt collector's letter which contains the following paragraph:

> I will assume all portions of this debt to be valid unless you dispute the validity of this debt or any portion thereof within thirty (30) days of the date you receive this letter. If you dispute the validity of this debt, you must notify me, in writing, within the time stated, that you dispute this debt.

Savage v. Hatcher, 2002 WL 484986 (S.D.Ohio March 7, 2002). The district court then considered whether defendants' demand that plaintiff notify defendants in writing of any dispute violates the FDCPA, thus rendering the notice ineffective. The court acknowledged that the language of § 1692g(a)(3) does not expressly require that a debtor's dispute be in writing, but nevertheless concluded that "the requirement of a writing does not render [defendant's] validation notice invalid." In doing so, the court recited in painstaking detail that the defendant's request for payment of the debt was in the form of a dated letter addressed to plaintiff, printed on defendant's stationery and contained defendant's contact information. The letter also included a heading which provided the check number, the amount of the check, the defendant's file number for the case, and the information about a $25.00 administrative charge. The court additionally referred to the Third Circuit's 1991 decision in *Graziano v. Harrison*, 950 F.2d 107 (3rd Cir.1991), where the court held a consumer's dispute

of a debt must be in writing to be effective, that a written dispute of a debt collection is preferred in courts because it creates a lasting record of the debt and avoids potential conflicts, and other sections of the FDCPA pertaining to the validation notice, specifically §§ 1692g(a)(4) and (a)(5), require that any dispute, to be effective, must be in writing. The district court, accordingly, concluded that defendant's validation notice would not be ruled ineffective merely because it required a dispute of the debt to be in writing and, thus, the letter comported with § 1692g because the letter contained a validation notice that complied with the FDCPA's requirements.

On appeal, the Sixth Circuit did not specifically mention the "in writing" controversy, nor did it refer to *Graziano*. Rather, that portion of the opinion addressing the alleged violation of § 1692g states:

> With respect to [plaintiff's] allegation that the two letters sent by the defendants violated Section 1692g – 'validation of debts' – we have carefully considered the pleadings, the statute, and the relevant case law, and we are satisfied that the district court properly granted the defendants' motion for judgment on the pleadings. Section 1692g(a) requires debt collectors to provide certain notification to consumer debtors. 15 U.S.C. § 1692g(a). In determining whether a debt collector has complied with the requirements of Section 1692g(a), we apply an objective test based on the understanding of the 'least sophisticated debtor.' *Smith v. Computer*

> *Credit, Inc.*, 167 F.3d 1052, 1054 (6th Cir.1999). To satisfy the requirements of Section 1692g(a), a debt collector's notice 'must effectively convey the notice to the debtor.' *Id.* It is well-settled that courts may properly make the objective determination whether language effectively conveys a notice of rights to the least sophisticated debtor. *See, e.g., id.*; *Smith v. Transworld Sys., Inc.*, 953 F.2d 1025, 1029 (6th Cir.1992). We have carefully reviewed the notice provided to Savage, and we are satisfied that the defendants met their burden under Section 1692g(a).

Savage, 109 Fed. App. at 762.

Thus, contrary to defendants' assertion herein that the Sixth Circuit has "analyzed this issue," the appellate decision in *Savage* did not examine the *in writing* requirement. Rather, the Sixth Circuit applied an objective test and determined that a dated letter printed on the debt collector's stationery, containing defendant's contact information, addressed to plaintiff, and which included a heading which provided the check number, the amount of the check, the defendant's file number for the case, and the information about a $25.00 administrative charge effectively conveyed notice of rights to the debtor.

Nevertheless, to the extent the Sixth Circuit opinion could be interpreted to permit a writing requirement, *Savage* is not a reported decision and does not carry the precedential value encouraged by

defendants. Therefore, it is incumbent upon this Court to independently examine this issue.

Some district courts have followed the Third Circuit's reasoning in *Graziano* and have determined that a writing is required to effectively dispute a debt and, thus, a writing requirement is implied in § 1692g(a)(3). *See, for e.g., Ingram v. Corporate Receivables, Inc.*, 2003 WL 21018650 (N.D. Ill. May 3, 2003), *Castillo v. Carter*, 2001 WL 238121 (S.D. Indiana Feb. 28, 2001) and *Sturdevant v. Thomas E. Jolas, P.C.*, 942 F.Supp. 426 (W.D.Wisc. 1996).

The majority of district courts, however, have disagreed with *Graziano* and have concluded that § 1692g(a)(3) does not impose a writing requirement on consumers. These courts have acknowledged that the plain language of subsection (a)(3) does not require that the consumer dispute the validity of the debt in writing and, consequently, any preference for writing should not override Congress's intent as evidenced by its chosen language. *See, for e.g., Vega v. Credit Bureau Enters.*, 2005 WL 711657 (E.D. N.Y. March 29, 2005), *Rosado v. Taylor*, 324 F.Supp.2d 917 (N.D.Ind. 2004), *Walters v. PDI Mangagement Services*, 2004 WL 1622217 (S.D. Ind. April 6, 2004), *Nasca v. GC Services Limited Partnership*, 2002 WL 31040647 (S.D.N.Y. Sept. 12, 2002), *Spearman v. Tom Wood Pontiac-GMC, Inc.*, 2002 WL 31854892 (S.D.Ind. Nov. 4, 2002), *Ong v. American Collections Enterprise*, 1999 WL 51816 (E.D.N.Y. Jan. 15, 1999) and *Reed v. Smith, Smith & Smith*, 1995 WL 907764 (M.D. La. Feb. 8, 1995).

More recently, and since the issuance of these district court opinions, the Ninth Circuit decided in *Camacho v. Bridgeport Financial, Inc.*, 430 F.3d 1078 (9th Cir. 2005), that a debt collector's notice violates the FDCPA in so far as it states that disputes of validity of debts must be in writing. *Camacho* expressly disagreed with *Graziano* because the court concluded that "we must give effect to the plain meaning of the statute." *Id.* at 1080. The court stated,

> 'When the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms.' (citing *Lamie v. United States Trustee*, 540 U.S. 526 (2004)) The plain meaning of § 1692g is that debtors can trigger the rights under subsection (a)(3) by either an oral or written 'dispute,' while debtors can trigger the rights under subsections (a)(4) and (a)(5) only through written dispute.
>
> * * *
>
> If Congress had intended to impose a writing requirement in § 1692g(a)(3), it could have done so in the subsection itself, as it did in the later subsections of § 1692g(a). *See* 15 U.S.C. § 1692g(a)(4), (5) As in *Lamie*, the plain language of the text of § 1692g(a)(3) does not state that the consumer must dispute the debt in writing[.]
>
> Further, the plain meaning of subsection (a)(3) does not lead to absurd results because

> an oral dispute triggers multiple statutory protections. . . .
>
> Oral dispute of a debt precludes the debt collector from communicating the debtor's credit information to others without including the fact that the debt is in dispute. 15 U.S.C. § 1692e(8); *Brady v. Credit Recovery Co.*, 160 F.3d 64, 67 (1st Cir.1998). Additionally, if a consumer owes multiple debts and makes a payment, the debt collector is prohibited from applying such payment to a debt which is in dispute. 15 U.S.C. § 1692h. Moreover, a debtor's oral notification to a debt collector entitles a debtor to relief under § 1692c(a)(1), which bars communication with a debtor at 'a time or place known or which should be known to be inconvenient to the consumer.' 15 U.S.C. § 1692c(a)(1).

Id. at 1081-1082. The court, therefore, concluded that while policy considerations may weigh in favor of *Graziano*'s interpretation, under *Lamie* a court can only insert language into a statute if the result of the statute's plain meaning is absurd. "Because we conclude that the FDCPA's statutory scheme, which assigns lesser rights to debtors who orally dispute a debt and greater rights to debtors who dispute it in writing, is not absurd, we are not at liberty to insert any additional language." *Id.* at 1082.

Defendants herein assert that the Ninth Circuit decision is a "rogue" opinion, not followed by any circuit court. (Doc. 12 at 2) Nevertheless, this Court has not found any court that has disagreed with

Camacho. In fact, the two district court decisions issued subsequent to *Camacho* have agreed with it and rejected *Graziano. Baez v. Wagner & Hunt, P.A.*, 422 F.Supp.2d 1273 (S.D. Fla. 2006)[1] and *Turner v. Shenandoah Legal Group, P.C.*, 2006 WL 1685698 (E.D. Va. June 12, 2006). It should also be recognized that Camacho was decided recently – on December 12, 2005.

This Court agrees with the majority of the district courts which have rejected *Graziano,* and it agrees with and adopts the reasoning of the Ninth Circuit in Camacho. The plain meaning of the statute is clear and unambiguous; subsection (a)(3) does not impose a writing requirement on consumers. Accordingly, this Court will not insert a writing requirement into the statute. This Court agrees with the Ninth Circuit that the plain meaning of the statute is neither absurd in its results nor contrary to legislative intent. For this reason, defendants' form validation notice violates the FDCPA in so far as it states that disputes must be made in writing.

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[1] Incidentally, *Baez* recognized that "the only circuit courts that have specifically addressed" the issue of whether a debt collection letter that requires a consumer to dispute a debt in writing violates the FDCPA "are the Third and Ninth Circuits." This reinforces this Court's interpretation that the Sixth Circuit in *Savage* failed to specifically address the issue.

Conclusion

For the foregoing reasons, defendants' Motion to Dismiss is denied.

IT IS SO ORDERED.

/s/ Patricia A. Gaughan
PATRICIA A. GAUGHAN
United States District Judge

Dated: 11/21/06

REPLY BRIEF

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IN THE

Supreme Court of the United States

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v.

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AND
ADRIENNE S. FOSTER,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
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REPLY BRIEF FOR THE PETITIONER

1. Notably, respondents do not even attempt to dispute that the circuits are divided on the question presented: the Eighth and Ninth Circuits have held that a debt collector's legal error does not qualify for the bona fide error defense under the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 et seq., while the Sixth and Tenth Circuits have reached a contrary conclusion. Nor do they dispute that this case is an ideal candidate for certiorari in several other respects: the case is an excellent vehicle for this Court to resolve the question presented, which recurs frequently and is both squarely raised by and outcome determinative of this case. Instead, respondents quibble only about the depth of the circuit split – characterizing the Second Circuit's decision in *Pipiles v. Credit Bureau of Lockport, Inc.*, 886 F.2d 22 (1989), as "dicta" – and attempt to downplay the significance of the decisions of the Eighth and Ninth Circuit. Both arguments are unavailing.

First, respondents' attempt to dismiss the Second Circuit's decision in *Pipiles* as "dicta" is belied by the opinion, which devotes an entire section to its discussion of the appellee's "Section 1692k(c) Defense," *see* 886 F.2d at 27. The court of appeals found that the credit bureau in that case had violated three subsections of the FDCPA; by contrast, it noted, the district court had found just one violation but concluded that even that violation "'may be excused under the circumstances' because the Bureau had no intent to deceive." *Id.* However, the court of appeals explained, the district court had failed to "consider[] .

. . the specific requirements of section 1692k(c) that the violation 'result[] from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.'" *Id.* (second alteration in original). And in any event, the court of appeals continued, "it is likely that the violations which we have found resulted from a mistaken view of the law, *which section 1692k(c) does not excuse*" (citing *Hulshizer v. Global Credit Servs., Inc.*, 728 F.2d 1037, 1038 (8th Cir. 1984) (per curiam), and *Baker v. G.C. Servs. Corp.*, 677 F.2d 775, 779 (9th Cir. 1982); emphasis added). Thus, although the court of appeals remanded the case to the district court to allow that court to determine "whether to allow the Bureau to tender a section 1692k(c) defense," it made clear that a defense based on a legal error was foreclosed. *See id.* ("In the event of an affirmative decision [by the district court], the defense should be evaluated in accordance with the foregoing discussion.").

District courts within the Second Circuit have repeatedly indicated that they regard the Second Circuit's decision in *Pipiles* as binding precedent,[1] as

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[1] *See, e.g., Register v. Reiner, Reiner & Bendett, PC*, 488 F. Supp. 2d 143, 147 (D. Conn. 2007) (rejecting debt collector's bona fide error defense; quoting *Pipiles*, court explained that Section 1692k(c) "does not excuse statutory violations that 'resulted from a mistaken view of the law'"); *Gervais v. Riddle & Assocs., P.C.*, 479 F. Supp. 2d 270, 279 (D. Conn. 2007) (citing *Pipiles*, including the Second Circuit "within th[e] majority" view that the bona fide error defense applies only to clerical and factual errors); *Dowling v. Kucker Kraus & Bruh, LLP*, No. 99 Civ. 11958 (RCC), 2005 U.S. Dist. LEXIS 11000, at *18 n.4

do other courts – including the Tenth Circuit – and commentators.[2]

Next, respondents attempt to downplay the significance of the decisions of the Eighth and Ninth Circuits holding that the bona fide error defense does not apply to legal errors. Their criticism is two-fold. First, they complain, "these decisions are over twenty-five years old." BIO 7. But that fact militates *in favor* of certiorari, as it merely underscores the extent to which the precedent is well-settled.[3]

(S.D.N.Y. June 6, 2005) (citing *Pipiles* for proposition that "§ 1692k(c) does not excuse a mistaken view of the law").

[2] *See Johnson v. Riddle*, 305 F.3d 1107, 1122 & n.14 (10th Cir. 2002) (citing Second Circuit's decision in *Pipiles* as one of the opinions "concluding that the defense is limited to clerical errors and cannot protect mistakes of law"); *Seeger v. AFNI, Inc.*, 548 F.3d 1107, 1114 (7th Cir. 2008) ("[T]he majority of our sister circuits, including the Second, Eighth, and Ninth, have limited the [bona fide error] defense to factual and clerical errors . . . ."); *Collection Bureau Servs., Inc. v. Morrow*, 87 P.3d 1024, 1030 (Mont. 2004) (noting "split of authority" regarding scope of bona fide error defense and following "majority view" – including, inter alia, *Pipiles* – "that the defense is only available for clerical and factual errors"); Elwin Griffith, *Identifying Some Trouble Spots in the Fair Debt Collection Practices Act: A Framework for Improvement*, 83 Neb. L. Rev. 762, 820 & n.397 (2005) (explaining that "[t]he trend of the cases is to deny the [bona fide] error defense for mistakes of law" and citing, inter alia, *Pipiles* as one of the cases following this trend).

[3] And, in any event, just last year this Court granted certiorari to consider a circuit split involving cases of similar vintage. *See* Pet. for Cert., No. 06-1505, *Meacham v. Knolls Atomic Power Lab.* 11-13 (describing circuit split involving 1983 Ninth Circuit decision (along with 1975 Sixth Circuit decision) on one side, with 2006 decisions of Second and Tenth Circuits on

Second, respondents dismiss the decisions of the Eighth and Ninth Circuits as relying on what they describe as a "faulty analogy between the bona fide error defenses contained in the FDCPA and TILA." *Id.* But the fact that respondents disagree with the merits of those courts' holdings does not make the circuit split any less compelling.

Respondents also posit that the Eighth Circuit's holding should not be considered "entrenched" because the court of appeals in *Picht v. John R. Hawks, Ltd.*, 236 F.3d 446 (8th Cir. 2001), simply cited back to *Hulshizer* and *Baker* without any additional analysis. BIO 8-9. But that is precisely the meaning of "entrenched"; because the Eighth Circuit regarded its decision in *Hulshizer* as settled precedent, it saw no need to re-analyze the issue in *Picht*.

Similarly, respondents' speculation that the Eighth and Ninth Circuits did not have the "benefit" of the Tenth Circuit's decision in *Johnson* and thus might change position if they were to re-consider the issue, BIO 9, borders on the implausible.[4] Nothing in the relevant provision has changed since the Eighth

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the other side), *cert. granted*, 128 S. Ct. 1118 (2008), *vacated and remanded*, 128 S. Ct. 2395 (2008).

[4] Because respondents characterize the Second Circuit's decision in *Pipiles* as "dicta," they do not speculate that it too would reverse course if given the opportunity. However, as petitioner has demonstrated, *see supra* at 1-3, that decision is not dicta, and it is equally implausible – for all of the reasons outlined here – that the Second Circuit would re-consider its position.

and Ninth Circuits issued their original decisions, and (as noted above) the Eighth Circuit subsequently applied its holding in *Picht*. Moreover, those circuits are likely to lack both the opportunity and incentive to re-consider their holdings: given the settled precedent, parties are unlikely even to litigate the question up to those courts, and neither circuit could unilaterally resolve the split by granting rehearing en banc. Finally, and in any event, such speculation cannot be reconciled with the Supreme Court of Montana's decision in *Collection Bureau Services*, which respondents do not address at all. In 2004 – that is, nearly two years after the Tenth Circuit's decision in *Johnson* – the court's opinion in *Collection Bureau Services* acknowledged *Johnson*'s holding "that mistakes of law can be considered bona fide errors," 87 P.3d at 1030, but nonetheless opted to follow the contrary decisions of Second, Eighth, and Ninth Circuits.

2. Turning to the merits of the case, respondents' arguments boil down to a single, largely circular proposition: the plain text of the statute does not exclude legal errors from the scope of the bona fide error defense; that interpretation cannot be absurd (and therefore must be enforced) because the Sixth and Tenth Circuits have so concluded. But petitioner's interpretation is perfectly consistent with – and in fact supported by – the plain text of the statute: as petitioner explains below, *see infra* at 7-8, Congress drafted the bona fide error provision of the FDCPA using language with a clear and well-settled legal meaning. Moreover, respondents' reasoning flies in the face of the overwhelming evidence, outlined in the petition, demonstrating that Congress

did not intend the bona fide error defense to apply to legal errors.

a. Respondents attempt to minimize the significance of the statutory scheme constructed by Congress, particularly with regard to the safe harbor provision. They contend that "[t]o require attorneys/debt collectors to forego a claim or to seek a formal opinion from the Federal Trade Commission . . . every time an ambiguity arises in connection with the FDCPA . . . would not only be impractical and cost prohibitive, but would also place ethical attorneys/debt collectors at substantial competitive disadvantage in contravention of the express purpose of the Act." BIO 14-15. But that argument relies on a false dichotomy: when faced with an ambiguity in the FDCPA, debt collectors are not limited to choosing only between "forego[ing] a claim or . . . seek[ing] a formal opinion from the FTC." Instead, they have a third choice, which is to err on the side of caution. For example, in this case, given the conflicting opinions in other circuits on the "in writing" requirement, the lack of any such requirement in the statute, and the lack of any published Sixth Circuit opinion, respondents could merely have included the exact same representation without the "in writing" requirement.

Nor do respondents satisfactorily explain why their reading of the bona fide error defense would not render the safe harbor defense effectively superfluous. They posit that the two defenses are "not mutually exclusive, but rather can and should work hand-in-hand," BIO 15, and that "aggressive attorneys/debt collectors can no more rely on the bona fide error defense for an intentional bad faith

legal mistake than they could for an intentional bad faith clerical error," BIO 17, but both of these contentions miss the point. As the petition explains (at 15-16), the safe harbor defense was intended to encourage debt collectors to seek FTC advice when the FDCPA is ambiguous. But if the bona fide error defense includes legal errors, debt collectors will have no incentive to seek an FTC opinion when their obligations under the FDCPA are unclear and there is no clear precedent prohibiting their actions; instead, they can rely on the ambiguity to shield them from liability.

b. Respondents next dismiss the history of the FDCPA, contending that "a review of the legislative history of the FDCPA does not show that Congress, in enacting the statute in 1977, was aware of the existing judicial interpretations of the bona fide error defense in TILA." BIO 19. But that argument turns ordinary canons of statutory construction on their head. As this Court has repeatedly made clear, Congress is *presumed* to be aware of the interpretations of the TILA bona fide error defense and to have adopted them when it employed the exact same defense in the FDCPA. *See, e.g.*, *Bragdon v. Abbott*, 524 U.S. 624, 644-45 (1998) (""Had Congress done nothing more than copy the Rehabilitation Act definition into the ADA, its action would indicate the new statute should be construed in light of this unwavering line of administrative and judicial interpretation. . . . When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative

and judicial interpretations as well."); *Rowe v. N.H. Motor Transp. Ass'n*, 128 S. Ct. 989, 994 (2008) ("We have said that 'when judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its judicial interpretations as well.'" (quoting *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85 (2006) (internal quotation marks and alterations omitted)).[5]

For their part, respondents seize on a single sentence in a Senate Report to support their contention that Congress – despite using language identical to the TILA bona fide error defense – nonetheless intended the defense "to be much broader than under TILA," BIO 20. That sentence provides that "[a] debt collector has no liability, however, if he violates the act *in any manner, including with regard to the act's coverage,* when such violation is unintentional and occurred despite procedures designed to avoid such violations." S. REP. NO. 95-382, at 5 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695. However, respondents omit the sentence that follows, which explains that "[a] debt collector also has no liability if he relied in good faith on an advisory opinion issued by the Federal Trade

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[5] Although respondents emphasize (at 18) a sentence in this Court's opinion in *Rowe* indicating that Congress was "fully aware of this Court's interpretation of" the language that it copied into another statute, nothing in *Rowe* indicates that this awareness was essential to the Court's holding.

Commission." *Id.* Taken together, these two sentences – which appear in a section entitled "Explanation of the Legislation" – simply reiterate the basic outlines of the statutory scheme – viz., the bona fide error defense and the safe harbor provision. Nothing suggests that Congress intended, *sub silentio*, to reject the settled interpretation of the TILA defense.

Nor should any significance be ascribed to Congress's failure to add language, as it did with the TILA, specifically indicating that the FDCPA bona fide error defense does not encompass legal errors. As the petition explained (at 19), Congress made clear that its 1980 addition to the TILA merely "*clarified* [the defense] to make clear that it applies to mechanical and computer errors, provided that they are not the result of erroneous legal judgments." S. REP. NO. 96-73, at 7-8 (1979), *reprinted in* 1980 U.S.C.C.A.N. 280, 285-86. The operative language of the TILA's bona fide error provision remained the same, as did the longstanding interpretation of that provision.

* * *

As the petition makes clear, the text, structure, history, and purpose of the FDCPA all indicate that Congress did not intend the statute's bona fide error provision to include legal errors. Respondents' argument to the contrary is unavailing.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, certiorari should be granted.

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BOTH 51RW50

QUESTION PRESENTED

Whether a debt collector's legal error qualifies for the bona fide error defense under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692k(c).

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BRIEF FOR THE PETITIONER

Petitioner Karen L. Jerman respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Sixth Circuit (Pet. App. 1a-18a) is published at 538 F.3d 469. The order denying the petition for rehearing and rehearing en banc (Pet. App. 42a-43a) is unpublished. The district court's opinion (Pet. App. 19a-41a) is published at 502 F. Supp. 2d 686.

JURISDICTION

The judgment of the court of appeals was entered on August 18, 2008. The order denying rehearing and rehearing en banc was entered on November 24, 2008. Pet. App. 42a. On February 17, 2009, Justice Stevens extended the time to file the petition to and including March 25, 2009. App. No. 08A710. On that date, petitioner filed a timely petition for a writ of certiorari, which this Court granted on June 29, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

1. Section 1692k of Title 15 of the United States Code – a provision of the Fair Debt Collection Practices Act (FDCPA) – provides in relevant part:

> (c) Intent
>
> A debt collector may not be held liable in any action brought under this subchapter if the

> debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.
>
> * * *
>
> (e) Advisory opinions of [the Federal Trade] Commission.
>
> No provision of this section imposing any liability shall apply to any act done or omitted in good faith in conformity with any advisory opinion of the Commission, notwithstanding that after such act or omission has occurred, such opinion is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

2. The appendix to this brief contains the entirety of 15 U.S.C. § 1692k and the relevant provisions of the Truth in Lending Act, 15 U.S.C. § 1640, as originally enacted and as amended in 1980; the Economic Stabilization Act Amendments of 1971, 12 U.S.C. § 1904 note; the Electronic Fund Transfer Act, 15 U.S.C. §§ 1693m(c), 1693h(c); the Real Estate Settlement Procedures Act, 12 U.S.C. § 2607(d)(3); the Expedited Funds Availability Act, 12 U.S.C. § 4010(c).

STATEMENT OF THE CASE

In 2006, respondents (a law firm and one of its attorneys) served petitioner Karen Jerman with a complaint seeking to recover a debt she had already paid. Under the Fair Debt Collection Practice Act (FDCPA), 15 U.S.C. § 1692 *et seq.*, debt collectors must, as part of their initial contact, provide consumers with certain prescribed notices. Respondents attached to their complaint a form notice, but it failed to comply with the requirements of the Act. When petitioner sued respondents for not providing proper notice, they did not deny that the notice said exactly what they intended it to say. Nonetheless, they argued that they were immune from liability under the Act's so-called "bona fide error defense" because they misunderstood what the law required. The question in this case is whether such ignorance of the law excuses a debt collector's violation of the Act.

1. Congress enacted the FDCPA in 1977 in light of "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors." 15 U.S.C. § 1692(a). Among the problems that Congress sought to address were cases in which "debt collectors [were] dunning the wrong person or attempting to collect debts which the consumer has already paid." S. Rep. 95-382, at 4, *as reprinted in* 1977 U.S.C.C.A.N. 1695, 1699. To address these problems, the FDCPA requires debt collectors to send consumers a written validation notice that specifies, among other things, the amount of the debt, the creditor's name, and an explanation

of how the consumer can dispute the debt. 15 U.S.C. § 1692g(a).

Under the FDCPA, both the Federal Trade Commission and consumers subjected to collection abuses may bring civil suits against debt collectors for violations of the Act. *See* 15 U.S.C. § 1692*l* (authorizing suit by the FTC); *id.* § 1692k (authorizing suits by victimized consumers). Individual consumers may recover their actual damages plus a maximum of one thousand dollars in statutory damages; awards in class actions are limited to actual damages plus the lesser of either $500,000 or one percent of the debt collector's net worth. 15 U.S.C. § 1692k(a).

Debt collectors may nonetheless avoid liability if they can establish either of two defenses. First, a "safe harbor" defense carves out an exemption for "any act done or omitted in good faith in conformity with any advisory opinion of the [Federal Trade] Commission." 15 U.S.C. § 1692k(e). Debt collectors can seek such an opinion through a written request that provides the Commission with all of the material facts and outlines the unresolved legal issue. 16 C.F.R. § 1.2(a). Second, a "bona fide error" defense exempts debt collectors from liability if they prove that "the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." 15 U.S.C. § 1692k(c).

2. Respondents were retained by Countrywide Home Loans, which held the mortgage on petitioner's home. Pet. App. 2a. In April 2006, they filed a complaint in state court to foreclose on the house. Pet. App. 2a. Three days later, respondents served

petitioner with both the complaint and, as required by the FDCPA, a validation notice informing her of her legal rights. Pet. App. 2a-3a.

Under the Act, the validation notice must include "a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector." 15 U.S.C. § 1692g(a)(3). By its terms, the provision does not require that the dispute be made in writing. And elsewhere in the same provision, where Congress required the consumer to communicate with the debt collector in writing, it said so expressly. *See id.* § 1692g(a)(2), (b).

In conflict with the statute, respondents' notice informed petitioner that her debt would be presumed valid unless disputed "in writing." Pet. App. 3a. After receiving the notice, petitioner hired an attorney, who wrote a letter for her, disputing the debt. Pet. App. 3a. In response, Countrywide checked its records and discovered that petitioner had fully repaid her mortgage. Respondents then dismissed the state-court complaint. Pet. App. 3a.

3. Petitioner subsequently filed this suit in federal court, alleging a violation of Section 1692g(a)(3) of the FDCPA. Pet. App. 3a. Her amended complaint sought actual and statutory damages, injunctive and declaratory relief, and class certification. *See* Amended Class Action Complaint: Unfair Debt Collection Practices § VII; Pet. App. 3a.

Respondents first moved to dismiss, arguing that the notice complied with the Act. Pet. App. 35a. The district court denied the motion, finding that the

notice violated the FDCPA because it required petitioner to dispute the alleged debt in writing even though the Act imposed no such restriction. Pet. App. 3a, 36a-37a.[1]

Respondents then moved for summary judgment, asserting among other things, the bona fide error defense. They argued that although they fully intended to notify petitioner that she was required to dispute the debt in writing, the resulting violation was not "intentional" within the meaning of the bona fide error defense because they honestly misunderstood what the Act required. Pet. App. 34a-35a. Moreover, they argued, their law firm maintained procedures reasonably adapted to avoid such legal errors, including among other things designating one of the firm's principals to take the lead in FDCPA compliance, sending him to continuing education classes on the Act, and subscribing to relevant legal periodicals. Pet. App. 35a. The district court agreed and entered summary judgment. Pet. App. 3a-4a.

4. On appeal, the Sixth Circuit affirmed. The court acknowledged that "the majority view" among the courts of appeals is that the FDCPA's bona fide

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[1] In support of their motion, respondents relied upon two district court decisions (one affirmed without discussion of the issue in an unpublished court of appeals opinion) that had upheld the practice of requiring disputes to be made in writing. The district court, however, found persuasive the only on-point court of appeals decision to address the question, *Camacho v. Bridgeport Fin., Inc.*, 430 F.3d 1078 (9th Cir. 2005). *See* Pet. App. 35a-37a.

error defense does not extend to mistakes of law. Pet. App. 8a. Those courts, the Sixth Circuit explained, relied in part on the fact that Congress borrowed the language of the FDCPA's defense from an earlier consumer protection statute, the Truth in Lending Act (TILA), 15 U.S.C. § 1640(c). Pet. App. 9a & n.3. When Congress enacted the FDCPA, the TILA's defense was "uniformly interpreted to apply only to clerical errors and not to legal errors." Pet. App. 8a (citation omitted).

The Sixth Circuit nonetheless found the majority position unpersuasive because in 1980 Congress amended the TILA to expressly provide that "an error of legal judgment with respect to a person's obligations under this subchapter is not a bona fide error." Pub. L. 96-221, § 615(a), 94 Stat. 180 (1980). The Sixth Circuit recognized that this amendment was enacted three years after the passage of the FDCPA; that as a result, when the FDCPA was passed the two statutes had identical language; and that at the time of the FDCPA's passage, this common language had been uniformly interpreted not to encompass legal errors. Pet. App. 13a. Even so, the Sixth Circuit concluded that the amendment indicated that "unlike the TILA, Congress did not intend to limit the [FDCPA's] defense to clerical errors." Pet. App. 14a.

The court further acknowledged that "it is more common to speak of procedures adapted to avoid clerical errors than to speak of procedures adapted to avoid mistakes of law." Pet. App. 13a (citation omitted). However, the court concluded that "there is nothing unusual about attorney collectors maintaining procedures, such as frequent education

and review of the FDCPA law, in order to avoid mistakes of law." Pet. App. 13a. Moreover, the court posited, "protection for attorneys who make bona fide errors of law is consistent with the FDCPA's purpose of eliminating abusive debt collection practices and ensuring that those debt collectors who refrain from abusive collection practices are not competitively disadvantaged." Pet. App. 14a.

5. On November 24, 2008, the Sixth Circuit denied petitioner's timely petition for rehearing and for rehearing en banc. Pet. App. 42a-3a.

6. On June 29, 2009, this Court granted certiorari.

SUMMARY OF ARGUMENT

The court of appeals held that respondents' violation of the Fair Debt Collection Practices Act (FDCPA) was excused because it arose from a mistake about the meaning of the statute and therefore fell within the purview of the statute's bona fide error defense. It would be surprising if that holding were correct, for ignorance of the law is rarely a defense, even against criminal punishment. In fact, although Congress sometimes limits certain remedies (like punitive damages or civil penalties) to cases in which defendants knew their conduct was unlawful, petitioner is unaware of any instance in which Congress has made mistake of law a complete defense to civil liability altogether.

Nothing in the language of the FDCPA demonstrates that Congress intended debt collectors to be the first to receive such favored treatment. The bona fide error defense is available only for violations that were "not intentional." 15 U.S.C. § 1692k(c). That respondents misunderstood the legal consequences of their conduct does not render the violation unintentional within the meaning of the statute. For example, this Court has repeatedly held that even in the criminal context, "the knowledge requisite to *knowing violation* of a statute is factual knowledge as distinguished from knowledge of the law." *Bryan v. United States*, 524 U.S. 184, 192 (1998) (emphasis added). There is no reason for a fundamentally different understanding of an *intentional* violation, especially when the consequence of withholding the defense is the imposition of modest financial liability rather than

imprisonment. Moreover, when Congress means to require that defendants both know what they are doing and know that they are violating the law, it typically uses the special term of art, "willful violation." For example, in the statutes from which the language of the FDCPA's bona fide error defense is drawn, Congress used the word "intentional" in the civil bona fide error defense and the word "willful" in parallel criminal enforcement provisions. This distinction was plainly considered and makes sense only in light of the traditional differences between intentional and willful conduct.

That Congress did not intend the bona fide error defense to protect legal mistakes draws further support from the Act's requirement that defendants prove that the error occurred despite the maintenance of "procedures reasonably adapted to avoid any such error." 15 U.S.C. § 1692k(c). It is not only linguistically awkward to refer to procedures reasonably adapted to avoiding legal errors, it is also quite difficult to develop standards for what constitutes reasonable procedures for avoiding mistakes of law. And doing so often would enmesh federal courts, and perhaps even lay juries, in the traditional state function of setting professional standards for the practice of law.

The court of appeals' opinion further conflicts with Congress's creation of a separate mechanism for resolving uncertainty about the Act's meaning. Congress allowed collectors who are in doubt about their obligations under the statute to seek an advisory opinion from the Federal Trade Commission. And if they follow the Commission's opinion, the Act's "safe harbor" defense protects them

from liability if that advice turns out to be unsound. The court of appeals' decision not only makes resort to that process unnecessary, but would in fact render the safe harbor defense entirely superfluous. That is, under the decision below, defendants who satisfy the elements of the safe harbor defense will always also satisfy the elements for the bona fide error defense. In particular, they will be able to claim that they did not believe they were violating the law (since they were following the Commission's advice) and that they had in place a procedure (seeking the advisory opinion) that is reasonably adapted to avoiding the violation.

Extending the bona fide error defense to legal errors would also undermine Congress's efforts to deter abusive collection practices. The defense would encourage debt collectors to take an aggressive view of the law when its requirements are not clear, knowing that there will be no liability if they cross the line into illegal conduct. Those who push the legal envelope will, in turn, enjoy a competitive advantage over those who correctly construe the law and limit their conduct accordingly. Moreover, the decision below will undermine the private enforcement efforts that Congress contemplated would be the principal means of deterring violations. Given the difficulty and uncertainty involved in rebutting a mistake of law defense, fewer plaintiffs are likely to be willing to undertake the risk and expense of litigation knowing that they may lose their case even if they prove a violation of their rights.

Nothing in Congress's 1980 amendment to the Truth in Lending Act (TILA) warrants a different

conclusion. When Congress amended the TILA to expressly provide that legal mistakes were not covered by that statute's bona fide error defense, it was not changing the law on legal errors, but simply making clear that its other amendments to the statute – which made it easier for lenders to avoid liability – should not be misconstrued as abrogating the pre-existing judicial consensus that the Act did not excuse mistakes of law. Because it was clarifying rather than changing the law, Congress made no alteration to the operative language of the TILA defense, which continues to have exactly the same elements as the FDCPA's. Accordingly, if anything, the TILA amendment reinforces the conclusion that Congress has long understood that neither provision establishes an exception to the presumption that ignorance of the law is no defense.

ARGUMENT

I. Interpreting the FDCPA To Provide A Defense For Mistakes Of Law Is Inconsistent With The Text Of The Statute.

The court of appeals' construction of the bona fide error defense of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692k(c), is wrong first and foremost because it cannot be squared with the text of the statute.

To qualify for the defense, it is not enough that respondents acted in good faith (*i.e.*, that their error was "bona fide"). Instead, they must also show that "the violation was not intentional" and that they maintained "procedures reasonably adapted to avoiding any such error." 15 U.S.C. § 1692k(c). The first of these requirements precludes defenses based on a mistake of law, because misunderstanding what the Act demands does not render a violation of its requirements "not intentional" within the meaning of the statute.[2] The awkwardness of referring to "procedures reasonably adapted to avoiding" legal errors, and the practical difficulties involved in developing standards to implement such a requirement, reinforce that conclusion.

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[2] By "mistake of law" or "legal error," petitioner means a mistake as to the requirements of the FDCPA itself, which is the kind of legal error respondents allege in this case. Whether the statute provides a defense to violations arising from other kinds of the legal errors (*e.g.*, as to the meaning of a different federal statute or state law) is addressed in the final section of this brief.

A. "The Violation Was Not Intentional"

To say that a "violation" of the law "was not intentional" could mean one of two things. It could mean that the defendant did not intend to commit the act that violated the statute. For example, the FDCPA generally prohibits a debt collector from calling a consumer past 9 p.m. local time. 15 U.S.C. § 1692c(a)(1). If the collector loses track of time, or does not realize the consumer is in a different time zone, she may accidentally place a call past 9 p.m., thereby unintentionally violating the Act in this sense. Alternatively, an unintentional violation could refer to a defendant who knows exactly what she is doing but does not realize that her intentional act will violate the statute.

Mistakes of law could find shelter in the bona fide error defense only under this second, broader reading. In this case, for example, respondents do not contest that they intended to include in their letter the language that violates the Act. They argue only that this conduct, although intentional, did not constitute an intentional violation of the statute. While that interpretation is not linguistically impossible, it runs contrary both to deeply embedded legal presumptions and common legal usage.

1. The language of the bona fide error defense must be understood in light of the "common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally." *Barlow v. United States*, 32 U.S. (7 Pet.) 404, 411 (1833); *See also Cheek v. United States*, 498 U.S. 192, 199 (1991) ("The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal

system."). One may have sympathy for defendants who suffer the consequences of violating the law despite their good faith belief they were complying with it. But as Justice Holmes explained more than a century ago, "to admit the excuse at all would be to encourage ignorance where the law-maker has determined to make men know and obey, and justice to the individual is rightly outweighed by the larger interests on the other side of the scales." OLIVER WENDELL HOLMES, THE COMMON LAW 48 (1881). *See also Utermehle v. Norment*, 197 U.S. 40, 55 (1905) ("It would be impossible to administer the law if ignorance of its provisions were a defense thereto."); *Magniac v. Thomson*, 56 U.S. 281, 300 (1853) ("To permit . . . ignorance of the law, to be alleged as the foundation of rights, or in excuse for omissions of duty, or for the privation of rights in others, would lead to the most serious mischief, and would disturb the entire fabric of social order.")

Of course, Congress occasionally departs from this standard rule, but exceptions are rare. The most common examples are found in some criminal statutes that limit punishment to those who violate the law knowing its requirements. *See, e.g.*, *Ratzlaf v. United States*, 510 U.S. 135, 140-149 (1994); *Cheek*, 498 U.S. at 199-200. Congress also occasionally limits certain penalties or remedies to the most culpable defendants who violate a known legal duty or act with reckless disregard of the law's commands. *See, e.g.*, *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 56-60 (2007) (construing 15 U.S.C. § 1681n(a)'s limitation on statutory and punitive damages); 15 U.S.C. § 45(m)(1) (limiting civil penalties); 29 U.S.C. § 260 (limiting liquidated damages).

But the bona fide error defense applies to civil, not criminal, claims. And it does not simply limit penalties and remedies; it provides a defense to any liability whatsoever. *See* 15 U.S.C. § 1692k(c) ("A debt collector *may not be held liable*. . . .") (emphasis added). It is exceedingly rare – indeed, as far as petitioner can tell, completely unprecedented – for Congress to make ignorance of the law a complete defense to all liability in the civil context.

The closest example of which petitioner is aware is the doctrine of qualified immunity. *See, e.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *see also Sayyed v. Wolpoff & Abramson*, 485 F.3d 226, 232 (4th Cir. 2007) (referring to FDCPA's bona fide error defense as offering "a kind of qualified immunity to debt collectors"). But even that example is not on point. For one thing, the doctrine provides a defense against liability for money damages, not an immunity from liability altogether. *See Morse v. Frederick*, 551 U.S. 393, 400 n.1 (2007).[3] Moreover, the defense is not truly an example of ignorance of the law being a defense, as it turns not on the defendant's actual knowledge about the law, but on whether the defendant has violated a right that was, as an objective matter, clearly established at the time of the incident. *See Harlow*, 457 U.S. at 818-19. Perhaps most importantly, neither Congress nor this Court has ever extended qualified immunity to private defendants like respondents. Instead, the

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[3] In addition, the defense is judge-made, not explicitly set forth in a statute. *See Harlow*, 457 U.S. at 806-07.

Court has explained that the defense is premised on the special need to protect government officials' exercise of discretion in the conduct of their public responsibilities, and for that reason has no application to private conduct. *See, e.g.*, *Richardson v. McKnight*, 521 U.S. 399, 407-12 (1997); *Wyatt v. Cole*, 504 U.S. 158, 165-69 (1992).

Accordingly, providing debt collectors with a mistake of law defense under the FDCPA would be a very unexpected thing for Congress to do.

2. Because Congress so rarely makes ignorance of the law a defense, courts are rightly reluctant to conclude that Congress has done so, absent clear evidence of that intent. *See, e.g.*, *Staples v. United States*, 511 U.S. 600, 622 n.3 (1994). That presumption is not overcome in this case simply because the statute refers to an intentional *violation* rather than an intentional *act*, as the Tenth and Seventh Circuits have suggested. *See Johnson v. Riddle*, 443 F.3d 723, 728 (10th Cir. 2006) (*Riddle II*); *Kort v. Diversified Collection Servs., Inc.*, 394 F.3d 530, 537 (7th Cir. 2005). As noted above, at best this formulation is ambiguous. Moreover, this Court and others have refused to construe similar formulations as sufficient proof that Congress intended to create a mistake of law defense.

In *United States v. International Minerals & Chemical Corporation*, 402 U.S. 558 (1971), for example, this Court considered a statute that authorized criminal penalties against anyone who "knowingly violates" certain regulations relating to the transportation of corrosive liquids. *Id.* at 559 (quoting 18 U.S.C. § 834(f)). The defendant argued that his ignorance of the regulation precluded the

Government from proving a knowing violation. Even though the statute imposed criminal penalties rather than civil liability, and even though it referred to a knowing *violation* rather than a knowing *act*, this Court still concluded that the statute did "not signal an exception to the rule that ignorance of the law is no excuse." *Id.* at 562. Congress's decision to use the word "knowingly," the Court explained, did not demonstrate its intent to "require[] proof of knowledge of the law, as well as the facts." *Id.* at 563.

Indeed, this Court has stated that as a general matter, "the knowledge requisite to a *knowing violation* of a statute is factual knowledge as distinguished from knowledge of the law." *Bryan v. United States*, 524 U.S. 184, 192 (1998) (emphasis added) (citation omitted); *see also Dixon v. United States*, 548 U.S. 1, 5 (2006) (same); *Babbitt v. Sweet Home Chapter of Cmties. for Greater Or.*, 515 U.S. 687, 697 n.9 (1995) (stating that Congress's reference to a "knowing[]" violation of the Endangered Species Act was not meant to create a "specific intent" crime);[4] *id.* at 722 (Scalia, J., dissenting on other grounds) (noting that a "requirement that a violation be 'knowing' means that the defendant must 'know the facts that make his conduct illegal'" and that "knowledge of the law . . . is not a requirement").[5]

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[4] A "specific intent" crime is one "in which the defendant must not only intend the act charged, but also intend to violate law." BLACK'S LAW DICTIONARY 973 (6th ed.).

[5] In *Safeco Insurance Company*, this Court assumed that ignorance of the law would prevent liability under a provision

The courts of appeals have reached the same conclusion under other statutes as well.[6]

Although these cases concerned "knowing" violations, there is no reason for a fundamentally different construction of statutes referring to "intentional" ones.[7] For example, the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1801 *et seq.*, limits damages to cases in which the defendant "has intentionally violated" the

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that applied to one who "willfully" violated the Fair Credit Reporting Act, by "obtaining a consumer report . . . knowingly without a permissible purpose." 551 U.S. at 59-60 (quoting 15 U.S.C. § 1681n(a)(1)(B)). That conclusion made sense because of the pairing of "willfully" and "knowingly" and because defendants cannot know they lack a "permissible purpose" without knowing what purposes the law defines as permissible. The Court did not hold that the statutory phrase "knowing violation" by itself implies knowledge of the law, contrary to its construction of that phrase in cases like *Bryan* and *International Minerals*.

[6] *See, e.g.*, *United States v. Sinskey*, 119 F.3d 712, 715 (8th Cir. 1997) (giving same interpretation to a Clean Water Act provision, 33 U.S.C. § 1319(c)(2)(A), which applies to anyone who "knowingly violates" certain of its provisions); *United States v. Hopkins*, 53 F.3d 533, 537-41 (2d Cir. 1995) (same); *United States v. Weitzenhoff*, 35 F.3d 1275, 1283-85 (9th Cir. 1993) (same); *see further United States v. Farrell*, 69 F.3d 891, 893 (8th Cir. 1995) (same for 18 U.S.C. § 924(a)(2), which punishes anyone who "knowingly violates subsection (a)(6) ... of section 922"); *United States v. Sherbondy*, 865 F.2d 996, 1002 (9th Cir. 1988) (same for 18 U.S.C. § 924(a)(1)(B), which punishes one who "knowingly violates subsection . . . (g) . . . of section 922").

[7] As far as petitioner can determine, this Court has never discussed whether knowledge of the law is required to commit an "intentional violation" of a statute.

Act. *Id.* § 1854(c)(1). The courts of appeals have uniformly construed this provision, and its predecessor, as applying even when defendants' ignorance of the law leads them to violate the statute.[8]

As these decisions indicate, statutory references to intentional conduct, or even intentional *violations*, are best understood to refer to defendants' intentions with respect to their actions, not to their intention to disobey a known legal duty. At the very least, they establish that the phrase does not unambiguously demonstrate Congress's intent to make an exception to the venerable principle that ignorance of the law is no defense.

3. Had Congress intended to provide a defense for mistakes of law, it would have used different language in Section 1692k(c). As Justice Stevens has explained, when Congress intends to refer to defendants who know their conduct is unlawful, it generally uses the word "willful" rather than "intentional":

> While a criminal defendant, like an employer, need not have knowledge of the law to act '*knowingly*' or *intentionally*, he must know that his acts violate the law or must "careless[ly] disregard whether or not one has

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[8] *See Bueno v. Mattner*, 829 F.2d 1380, 1383-86 (6th Cir. 1987); *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334, 1346 (5th Cir. 1985) (same under predecessor statute, 7 U.S.C. § 2050a(b) (repealed 1982)); *Alvarez v. Longboy*, 697 F.2d 1333, 1338 (9th Cir. 1983) (same); *Alvarez v. Joan of Arc, Inc.*, 658 F.2d 1217, 1224 (7th Cir. 1981) (same).

> the right so to act" in order to act '*willfully*.' We have interpreted the word "willfully" the same way in the civil context.

Kolstad v. American Dental Ass'n, 527 U.S. 526, 549 (1999) (Stevens, J., concurring in part and dissenting in part) (emphasis added) (citations omitted). Thus, in *Trans World Airlines v. Thurston*, 469 U.S. 111, 125-27 (1985), the Court construed a provision of the Age Discrimination in Employment Act authorizing liquidated damages for "willful violations." 29 U.S.C. § 626(b). The Court concluded that a violation of the Act was "willful'" within the meaning of this provision if the employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.'" 469 U.S. at 126 (citation omitted); *see also Hazen Paper Co. v. Biggins*, 507 U.S. 604, 614 (1993) (same); *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988) (giving same construction to 29 U.S.C. § 255a, which provides a three-year limitations period for a "willful violation" of the Fair Labor Standards Act).

It is unlikely that in enacting the FDCPA, Congress used the word "intentional" intending for courts to give it the meaning traditionally reserved for the word "willful." In fact, the origins of the bona fide error defense belie any such suggestion. The language of the defense originated in the Truth in Lending Act, Pub. L. 90-321, § 130, 82 Stat. 157 (1968); 15 U.S.C. § 1640(c) (1968) (reproduced at App. 4a). Unlike the FDCPA, the TILA contains both a civil private right of action and criminal penalties. *See* 15 U.S.C. §§ 1611, 1640. Whereas the bona fide error defense applies to those who do not violate the act *intentionally*, *id.* § 1640(c), the criminal provision

applies only to those who "*willfully and knowingly* . . . fail[] to comply with any requirement imposed under this subchapter," *id.* § 1611 (emphasis added).

This distinction between "intentional" violations on the one hand and "willful and knowing" violations on the other is consistent with the ordinary legal use of those terms. Willful violations, being the most culpable because undertaken with knowledge of the Act's requirements, are subject to the severe sanction of criminal penalties. On the other end of the spectrum, truly unintentional violations – *i.e.*, cases in which the lender did not intend to commit the act that violates the statute, say because it accidentally forgot to include a required disclosure form in a loan package – qualify for a complete defense to any liability at all. And defendants in the middle – like the lender who intentionally withheld information based on the mistaken belief that its disclosure was not required – are protected from criminal, but not civil, liability.

It should come as no surprise, therefore, that by the time Congress enacted the FDCPA, every court of appeals to have considered the question had rejected the view that the TILA's bona fide error defense excused mistakes of law. *See Ives v. W. T. Grant Co.*, 522 F.2d 749, 757-58 (2d Cir. 1975); *Haynes v. Logan Furniture Mart, Inc.*, 503 F.2d 1161, 1166-67 (7th Cir. 1974); *see also Turner v. Firestone Tire & Rubber Co.*, 537 F.2d 1296, 1298 (5th Cir. 1976) (defense applies only to "clerical errors"); *Palmer v. Wilson*, 502 F.2d 860, 861 (9th Cir. 1974) (same).

Congress again distinguished "intentional" from "willful" violations when it included a bona fide error defense in the Economic Stabilization Act

Amendments of 1971 (ESAA), Pub. L. 92-210, 85 Stat. 743 (Dec. 22, 1971), 12 U.S.C. § 1904 note (expired 1974). Like the TILA, that statute provided criminal penalties for those who "willfully violate[d]" its requirements. *Id.* § 208. In addition, Congress added a proviso to the Act's bona fide error defense, limiting remedies even when the defense did not apply, so long as the violation was not "*willful* within the meaning of" the criminal provision. *Id.* § 210 (reproduced at App. 5a) (emphasis added). Courts at the time interpreted "willful" in the traditional sense of conduct undertaken with knowledge that it was unlawful. *See Longview Refining Co. v. Shore*, 554 F.2d 1006, 1014 (Temp. Emer. Ct. App. 1977); *see also, e.g., E. Air Lines, Inc. v. Atl. Richfield Co.*, 712 F.2d 1402, 1411 (Temp. Emer. Ct. App. 1983). But if that is what Congress meant by "willful," it clearly could not have meant "intentional" – used in the very same provision – to mean the same thing.

The inescapable conclusion is that under the TILA and the ESAA, a mistake of law was a defense to criminal charges but did not fall within the bona fide error defense to civil liability. By adopting the FDCPA's bona fide error defense *in haec verba* from these prior statutes, Congress is presumed to have intended the same limitation on the scope of the FDCPA's bona fide error defense as well. *See, e.g., Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979).

4. In addition to the word "willful," Congress had at its disposal other ways to unambiguously signal a departure from the general rule that ignorance of the law is no defense.

One example is found in Federal Trade Commission Act, 15 U.S.C. §§ 41 *et seq.*, which establishes the Federal Trade Commission's power to enforce, among other things, the FDCPA. *See* 15 U.S.C. § 1692*l*. The statute allows the Commission to obtain a civil penalty against any defendant who "violates any rule under this chapter respecting unfair or deceptive acts or practices . . . *with actual knowledge or knowledge fairly implied* . . . that such act is unfair or deceptive and *is prohibited by such rule*." 15 U.S.C. § 45(m)(1)(A) (emphasis added); *see also id.* § 45(m)(1)(B)(2) (referring to defendants' "actual knowledge that such act . . . is unlawful under subsection (a)(1) of this section").

Likewise, a provision of the Portal-to-Portal Act allows a district court to withhold statutory damages "if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and *that he had reasonable grounds for believing that his act or omission was not a violation* of the Fair Labor Standards Act of 1938, as amended . . . ." 29 U.S.C. § 260 (emphasis added). And in the Cable Communications Policy Act, 47 U.S.C. §§ 521 *et seq.*, Congress allowed courts to reduce the amount of damages when the "violator was not aware and had no reason to believe that his acts constituted a violation of this section." *Id.* § 553.

None of these provisions breaks from the general rule that ignorance of the law is no defense to civil liability; each simply limits certain forms of relief once the defendant is found liable. But they do demonstrate that if Congress had intended the FDCPA to give debt collectors the unprecedented protection of complete immunity from all liability

based on their ignorance of the law, it would have known how to make that decision clear.

B. "Procedures Reasonably Adopted To Avoid Any Such Error"

In addition to requiring that the defendant's violation must have been unintentional, the Act provides a defense only if the defendant has maintained "procedures reasonably adapted to avoid any such error." 15 U.S.C. § 1692k(c). The Sixth Circuit acknowledged that "it is more common to speak of procedures adapted to avoid clerical errors than to speak of procedures adapted to avoid mistakes of law." Pet. App. 13a (citation omitted). Indeed, the difficulty of applying the Act's reasonable procedures requirement to legal errors provides significant reason to conclude Congress did not intend courts to attempt it.

There are any number of ways in which clerical and other non-legal errors may lead to unintended violations of the statute. For example, the Act provides that if a consumer instructs a debt collector in writing that she refuses to pay the debt, the debt collector must cease communications. 15 U.S.C. § 1692c(c). It is easy enough to imagine record-keeping systems designed to ensure compliance with that requirement. *See, e.g., Smith v. Transworld Sys., Inc.*, 953 F.2d 1025, 1031 (6th Cir. 1992). Likewise, office procedures and policies are easily seen as methods to avoid calling consumers at times and places the Act forbids. *See* 15 U.S.C. §§ 1692c(a)(1), (3). And debt collectors can guard against violating the Act's prohibition against false representations about the amount of the debt, *id.*

§ 1692e(2), through procedures designed to double-check the accuracy of calculations.

On the other hand, courts that have extended the defense to legal errors have struggled to define just what constitutes a procedure reasonably adopted to avoid misinterpreting the law. Must lay collectors seek the advice of counsel in order to claim the defense?[9] If not, should attorney-collectors be held to a higher standard than non-attorneys? Must defendants show that they researched the specific legal question at issue, or will procedures that generally protect against legal error suffice?[10] Is it reasonable to delegate legal research responsibilities to subordinates, or must the "attorney in charge" personally "make a core legal decision as to whether a particular practice is permitted by law"?[11] Must a reasonable procedure include seeking an advisory opinion from the Federal Trade Commission or some

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[9] *See Ruth v. Triumph P'ships*, No. 08-3458, 2009 WL 2487092, at *12 (7th Cir. Aug. 17, 2009) (holding that debt collector must either seek "the legal opinion of an attorney who has conducted the appropriate legal research" or "the opinion of another person or organization with expertise in the relevant area of law – for example, the appropriate government agency").

[10] *Compare Johnson v. Riddle*, 443 F.3d 723, 729 (10th Cir. 2006) (*Riddle II*) (holding that the procedure must be reasonably adapted "to avoid the specific error at issue") *with* Pet. App. 15a-16a (seemingly finding that procedures directed at avoiding legal errors generally were sufficient).

[11] *Riddle II*, 443 F.3d at 730 (holding that attorney in charge must conduct research).

other expert body on uncertain questions?[12] Is filing a test case against the consumer a permissible, or required, reasonable procedure for avoiding legal error?[13] And are these questions for the court or a jury?[14]

Moreover, in many cases such as this, applying the reasonable procedures requirement to legal errors is not only difficult, but puts federal courts (or even lay juries) in the awkward position of having to establish standards for the professional conduct of attorneys, an area traditionally left to the states. *See Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975). This Court should not adopt a construction of the Act that would "alter[] the existing balance of federal and state powers" "absent a clear indication of Congress' intent" to do so. *Salinas v. United States*, 522 U.S. 52, 59 (1997).

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[12] *Compare Ruth*, 2009 WL 2487092, at *12 (so requiring if an attorney is not consulted) *with* Pet. App. 16a-17a (rejecting requirement in this case).

[13] *See Riddle II*, 443 F.3d at 731 (holding that filing a test case can be a "sufficient procedure").

[14] *Compare Ruth*, 2009 WL 2487092, at *12 (establishing minimum required standards as a matter of law) *with Riddle II*, 443 F.3d at 730-31 (suggesting that reasonableness of legal procedures is a jury question).

II. Allowing A Mistake Of Law Defense Renders The Advisory Opinion Process Ineffective, And The Safe Harbor Defense Superfluous.

Interpreting the bona fide error defense to excuse legal errors is also incompatible with the provisions of the statute that encourage debt collectors to resolve legal uncertainty about the requirements of the Act by seeking advisory opinions from the Federal Trade Commission.

As part of its mandate to enforce compliance with the FDCPA, the Commission is authorized to issue advisory opinions on the Act's meaning and application. *See* 15 U.S.C. §§ 46, 1692*l*, 1692k(e); 16 C.F.R. § 1.1. Congress further provided a "safe harbor" defense, under which debt collectors are immune from liability for "any act done or omitted in good faith in conformity with any advisory opinion of the Commission." 15 U.S.C. § 1692k(e). Recognizing a defense for mistakes of law conflicts with these provisions in two ways.

First, it is unlikely that Congress would have intended courts to force an awkward fit between legal errors and the bona fide error defense when it had already provided a more direct solution to the same problem. Congress recognized that there may be times when legal uncertainty puts debt collectors at risk for liability. But it dealt with that problem by providing them with access to an advisory opinion process to obtain clarification about the law's requirements and an incentive (in the form of a defense) to seek that advice rather than persisting in practices of questionable legality. That simple, low-

cost solution is more consistent with the Act's central purpose of protecting consumers, as it focuses on *preventing* violations of consumers' rights, rather than *excusing* violations that often might have been avoided if the collector had taken advantage of the advisory opinion process.

Second, the court of appeals' decision renders the safe harbor defense superfluous. Under that decision, every application of the safe harbor defense is already covered by the bona fide error provision. That is, debt collectors who act in compliance with a Commission opinion will always be able to claim that they did not believe their conduct was unlawful. Consequently, any violation would be "not intentional," as the Sixth Circuit has construed the term. Moreover, there should be no question that following the Commission's advice would qualify as a "procedure[] reasonably adapted to avoid any such error." 15 U.S.C. § 1692k(c); *see Ruth v. Triumph Partnerships*, No. 08-3458, 2009 WL 2487092, at *12 (7th Cir. Aug. 17, 2009). As a result, under the court of appeals' interpretation, satisfying the conditions of the safe harbor defense will always establish an independent defense under the bona fide error provision.[15]

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[15] The Sixth Circuit's interpretation also would allow defendants to evade the limitations Congress wrote into the safe harbor defense. For example, that defense protects only reliance on an advisory opinion issued by the Commission itself; an informal staff opinion will not suffice. *See Hulshizer v. Global Credit Servs., Inc.*, 728 F.2d 1037, 1038 (8th Cir. 1984). Yet under the Sixth Circuit's decision, defendants could claim that in acting in accordance with a staff opinion, they honestly

This Court has long "express[ed] a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment." *Pa. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 562 (1990). Here, the bona fide error and safe harbor defenses may easily be harmonized, the former addressing non-legal errors and the latter addressing errors of legal judgment. That interpretation is consistent not only with the presumption against surplusage, but also with the best reading of the text of the bona fide error defense and, as discussed next, with the statute's underlying purposes.

III. A Mistake Of Law Defense Would Be Inconsistent With The Purposes Of The Act.

Applying the bona fide error defense to legal errors also would unnecessarily undermine Congress's effort to deter unfair collection practices and to protect honest debt collectors from suffering a competitive disadvantage when they act with the restraint the FDCPA requires.

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believed they were complying with the statute and had maintained reasonable procedures by looking to the staff opinion for guidance.

A. Excusing Legal Errors Would Undermine The Statute's Deterrent Effect.

Congress was well aware that the debt collection market – which generally compensates collectors by giving them a percentage of the money collected – establishes an economic incentive for aggressive, misleading, and even abusive practices. *See* S. Rep. 95-382, at 2, *as reprinted in* 1977 U.S.C.C.A.N. 1695, 1696. The decision below undermines the FDCPA's ability to play its intended countervailing role. Under that decision, so long as a debt collector maintains procedures reasonably adapted to avoiding legal error, there is no penalty for wrongly taking a restrictive view of the Act's prohibitions when the law is uncertain. And in many cases, there will be a very real financial benefit to taking certain actions even if they are ultimately found to be illegal. *Cf., e.g.*, *Johnson v. Riddle*, 305 F.3d 1107, 1111, 1121-24 (10th Cir. 2002) (*Riddle I*) (holding mistake of law defense available in case in which defendant unlawfully added a $250 bounced check fee to debt).

Relatedly, excusing mistakes of law conflicts with Congress's intent "to insure that those debt collectors who refrain from abusive debt collection practices are not competitively disadvantaged." 15 U.S.C. § 1692(e). As between similarly situated debt collectors, all having procedures reasonably designed to avoid legal errors, the Sixth Circuit's decision provides a competitive advantage to the collectors who take the more aggressive, but incorrect, view of the law. For example, debt collectors who construe the Act as allowing them to demand that all debt disputes be made in writing may avoid the expense

and inconvenience of accepting disputes over the telephone, while their law-abiding competitors must bear those costs as a consequence of correctly construing of the Act. That result is not only unfair to the law-abiding collectors, but creates a race to the bottom that will leave the field to collectors with the fewest scruples. This is exactly what Congress intended the FDCPA to prevent.

Finally, allowing ignorance of the law as a defense would undermine Congress's efforts to "eliminate abusive debt collection practices by debt collectors," 15 U.S.C. § 1692(e), through rigorous private enforcement of the Act. As the Federal Trade Commission recently explained, "Congress made clear that the FDCPA was intended to be a 'primarily self-enforcing' statute, with private individual and class actions providing collectors with a powerful incentive to comply with the statute." FEDERAL TRADE COMMISSION, COLLECTING CONSUMER DEBTS: THE CHALLENGE OF CHANGE 66 (2009)[16] (quoting S. Rep. 95-382, at 5, *as reprinted in* 1977 U.S.C.C.A.N. 1695, 1699). Although the Act gives enforcement authority to the Government as well, "[b]ecause the Commission receives more than 70,000 third-party debt collection complaints per year, it is not feasible for federal government law enforcement to be the exclusive or primary means of deterring all possible law violations." *Id.* at 67. Accordingly, the Commission has concluded, private actions "are

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[16] *Available at* http://www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf.

critical in deterring those who would violate the FDCPA." *Id.*

However, there are substantial impediments to consumer enforcement. Although the aggregate injury to the nation from unlawful debt collection practices is high, the harm is diffuse and difficult to quantify in any individual action for damages. At the same time, litigation is time consuming and expensive. Congress took steps to counteract these disincentives by providing modest liquidated damages, allowing class actions, and authorizing attorney fee awards. *See* 15 U.S.C. § 1692k(a). Ordinarily, such measures strike an appropriate balance by encouraging suits by those who are confident that they can establish a violation of the statute, while discouraging marginal claims. But recognizing ignorance of the law as a complete defense to an otherwise meritorious claim would upset that balance. Responding to a mistake of law defense is especially difficult and costly – in this case, for example, the validation notice alone provided all the evidence necessary to prove a violation of the Act; attempting to rebut respondents' assertion of a bona fide mistake of law required depositions and document production. Perhaps even more importantly, the outcome of the defense is inherently uncertain in light of the difficulty in proving or disproving what another person knew and the imprecise standards for deciding what constitutes a procedure "reasonably adapted" to avoiding legal error. The prospect of spending significant amounts of time and money to prove a violation of the statute, only then to lose the case anyway, would be enough to deter even the most stalwart plaintiff and her

attorneys. As a result, accepting the court of appeals' construction of the Act could dramatically undermine the principal means Congress established for the statute's enforcement.

B. Debt Collectors Can Be Protected From Unfair Liability Without Excusing Their Mistakes Of Law.

Respondents have no ground to complain that petitioner's construction of the Act fails to afford debt collectors the protection from unfair liability Congress intended to provide them.

To be sure, under petitioner's interpretation, some defendants will be held liable for good-faith misunderstandings of the law. But as noted in the beginning of this brief, that hardly distinguishes debt collectors from any other member of society in a legal system that generally declines to allow ignorance of the law as a defense. Indeed, as Justice Frankfurter once observed, the laws "are thick with provisions that command that some things not be done and others be done, although persons convicted under such provisions may have had no awareness of what the law required or that what they did was wrongdoing." *Lambert v. California*, 355 U.S. 225, 230 (1958) (Frankfurter, J., dissenting).

In fact, Congress has already provided debt collectors with special protections in the form of a defense for violations based on non-legal errors, 15 U.S.C. § 1692k(c), and an easy and cost-effective way to obtain expert advice on the meaning of the Act that will shield them from liability so long as they follow it, *id.* § 1692k(e); *see supra* 28. Moreover, like all others expected to comply with the sometimes

uncertain requirements of the law, debt collectors can mitigate the risk of liability through careful study of the law, reliance on forms and procedures developed by expert bodies,[17] and by forgoing practices of questionable lawfulness. *See FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 393 (1965) ("[I]t does not seem unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line.") (citation and quotation marks omitted).

In addition, Congress limited the extent of debt collectors' financial exposure when they do violate the Act. It capped statutory damages at $1,000 in individual actions, 15 U.S.C. § 1692k(a)(2)(A), and at the lesser of $500,000 or one percent of the debt collector's net worth in class actions, *id.* § 1692k(a)(2)(B). And it made the amount of the statutory damages award discretionary, to be set based upon a number of factors such as "the frequency and persistence of noncompliance by the debt collector," "the nature of such noncompliance," and "the extent to which such noncompliance was intentional." *Id.* §§ 1692k(a)(2)(B), (b)(2).

Accordingly, the statute already provides debt collectors with considerably more protection than other businesses subject to federal regulation enjoy. If more is required, it must be sought from Congress rather than this Court.

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[17] *See* Pet. App. 16a (discussing the model validation notice form created by the American Collector's Association).

C. The FDCPA's Legislative History Does Not Reveal A Contrary Purpose.

Respondents and the court of appeals nonetheless assert that the legislative history demonstrates Congress's intent to provide debt collectors broad protection for any kind of good faith mistake, including legal errors. *See* Pet. App. 13a-14a; BIO 19-20. For this conclusion, they rely on a single sentence in a Senate report, which states that a "debt collector has no liability, however, if he violates the act in *any* manner, including *with regard to the act's coverage*, when such violation is unintentional and occurred despite procedures designed to avoid such violations." S. Rep. 95-382, at 5, *as reprinted in* 1977 U.S.C.C.A.N. 1695, 1700 (emphasis added).

Because the report stated that the defense protected those who violate the Act in "any" manner, the court of appeals assumed that the report must have envisioned legal as well as non-legal errors. *See* Pet. App. 14a. But the quotation makes clear that the defense excludes liability only so long as the violation is "unintentional." And as shown above, a violation arising from a mistake of law is not "unintentional."

Nor does the sentence's reference to violations relating to the "act's coverage," necessarily imply that the authors of the report were contemplating mistakes of law. For example, the statute covers only efforts to collect consumer, not commercial, debts. *See* 15 U.S.C. § 1692a(5)-(6). Debt collectors who mistakenly believe that a debt was incurred in a professional, rather than a personal, capacity could wrongly conclude that they were attempting to

recover a commercial debt falling outside the scope of the Act's coverage. *See, e.g.*, *Slenk v. Transworld Sys., Inc.*, 236 F.3d 1072, 1074-76 (9th Cir. 2001) (holding summary judgment precluded in light of disputed questions of fact regarding whether a particular debt was a consumer or commercial debt).

In any event, even if the writers of this single sentence in the report of one house of Congress believed that the legislation they were drafting would cover legal errors, the language that they proposed, the Congress as a whole adopted, and the President signed, does not comport with that expectation. As a result, even if respondents and the court of appeals correctly construed the report, this one indicia of legislative intent would be insufficient to overcome the presumption that ignorance of the law is no defense. *See, e.g.*, *Int'l Minerals & Chem. Corp.*, 402 U.S. at 562-63.

D. This Court Did Not Assume In *Heintz v. Jenkins* That Congress Intended To Provide A Mistake Of Law Defense For Attorney Debt Collectors.

Nor did this Court's decision in *Heintz v. Jenkins*, 514 U.S. 291 (1995), suggest that Congress intended to protect debt collectors from liability for legal errors, as the court of appeals wrongly believed. *See* Pet. App. 10a-11a, 13a.

In *Heintz*, the Court held that the FDCPA applied to attorney debt collectors, notwithstanding the defendant's claim that this would "automatically . . . make liable any litigating lawyer who brought, and then lost, a claim against a debtor." 514 U.S. at 295. That worry was unfounded, the

Court explained, pointing out that "the Act says explicitly that a 'debt collector' may not be held liable if he 'shows by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.'" *Id.* (quoting 15 U.S.C. § 1692k(c)). The Court further noted that "[i]n any event," there was no reason to think that "the fact that a lawsuit turns out ultimately to be unsuccessful could, by itself, making the bringing of it an 'action that cannot legally be taken,'" within the meaning of the FDCPA's prohibitions. *Id.* at 295-96 (quoting 15 U.S.C. § 1692(e)(5)).

Nothing in this passage is inconsistent with petitioner's interpretation. The Sixth Circuit assumed that in suggesting that the bona fide error defense could protect a defendant from liability for filing an unsuccessful lawsuit, the Court must have contemplated that the defense would apply to legal errors. The unspoken premise of that assumption is that lawsuits generally fail because the lawyers who bring them misunderstood the governing law. But the facts of this case demonstrate that this premise is false – respondents' collection lawsuit against petitioner failed (or would have failed if they had not dismissed it) not because they misunderstood the law but because they mistakenly believed petitioner was in arrears on her mortgage when, in fact, she had paid it off. Pet. App. 3a.

In any event, the Court's passing reference to the bona fide error defense was not intended to predetermine the question presented here, which did not arise in *Heintz* and was not briefed in that case.

IV. Congress's Amendment To The Truth In Lending Act Did Not Change The Meaning Of The FDCPA's Bona Fide Error Defense.

For the foregoing reasons, there is every reason to believe that when Congress enacted the FDCPA, it did not intend the Act to excuse violations arising from mistakes of law. Contrary to the Sixth Circuit's decision, Congress's amendment of the Truth in Lending Act three years later does not warrant a different conclusion.

The Sixth Circuit placed significant weight on the fact that in 1980 Congress amended the TILA to declare expressly that legal mistakes do not qualify as bona fide errors under that statute's defense, but made no such amendment to the FDCPA.[18] The court concluded that "the fact that the TILA's bona fide error provision expressly excludes errors of legal judgment while the analogous provision in the FDCPA does not have such limitation suggests that, unlike the TILA, Congress did not intend" to preclude legal mistakes from protection under the FDCPA. Pet. App. 13a-14a. The court drew the wrong inference from the amendment. If anything, the 1980

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[18] The amendment added the following sentence to the end of 15 U.S.C. § 1640(c): "Examples of a bona fide error include, but are not limited to, clerical, calculation, computer malfunction and programing, and printing errors, except that an error of legal judgment with respect to a person's obligations under this subchapter is not a bona fide error." Pub. L. 96-221, § 615(a); *see also* App. 4a (reproducing amended Section 1640 in full).

revision to the TILA confirms that neither statute provides immunity for mistakes of law.

A. The Sixth Circuit Misconstrued The Intent And Effect Of The 1980 Amendment To The TILA.

The Sixth Circuit apparently reasoned that: (1) the 1980 amendment provided that legal errors are not covered by the TILA's defense; (2) this must mean that before the amendment, the TILA *did* provide a defense for legal errors; (3) because the FDCPA has the same language as the original TILA defense, the FDCPA's provision must also apply to legal mistakes; and (4) because Congress did not amend the FDCPA, this must mean that Congress intended that statute to continue providing a mistake of law defense, although the TILA no longer does.

This syllogism fails for at least four reasons.

First, it assumes that the 1980 amendment was meant to change, rather than codify, existing law as it pertained to legal mistakes. There is no basis for that assumption. No one thinks, for example, that the FDCPA's bona fide error defense excludes clerical errors simply because the TILA now expressly mentions them but the FDCPA does not. *Compare* 15 U.S.C. § 1640(c) (stating that "[e]xamples of a bona fide error include . . . clerical . . . errors") *with* 15 U.S.C. § 1692k(c) (including no examples). Instead, everyone accepts that in expressly providing that the TILA defense extends to clerical errors, Congress was simply codifying existing law that applies equally to the FDCPA as well. The same is true with respect to legal errors. Congress included its reference to legal errors not to change the law, but rather to make clear

that although other portions of the 1980 amendment may have expanded the scope of the defense, Congress did not intend to go so far as to make ignorance of the law an excuse.

In 1980, there was no need to change the meaning of the TILA to exclude legal mistakes – at that time, every court of appeals to have construed the defense had already held that mistakes of law were not covered. *See supra* at 22. Moreover, for the reasons set forth above, Congress would have had every reason to believe that those decisions were correct, and that as enacted, the statute already excluded mistakes of law. Accordingly, the more plausible inference is that Congress intended its reference to legal mistakes to codify the existing consensus. *See, e.g.*, James Lockhart, *What Constitutes Truth In Lending Act Violation Which "Was Not Intentional And Resulted From Bona Fide Error Notwithstanding Maintenance Of Procedures Reasonably Adapted To Avoid Any Such Error" Within Meaning Of § 130(c) Of Act (15 U.S.C.A. § 1640(c))*, 153 A.L.R. FED. 193, § 2[a] (1999) (noting that "this amendment was intended merely to clarify what was then the prevailing view, that the bona fide error defense applies to clerical errors, not including errors of legal judgment").

The amendment's purposes and history are consistent with that view. Although the Sixth Circuit assumes that the point of the 1980 legislation was to make it *harder* for lenders to avoid liability (*i.e.*, by changing the law to deprive them of a mistake of law defense), other provisions of the amendment and the legislative history show that Congress had precisely the opposite intention. A Senate report explained

that the legislation was prompted in part by "evidence that many creditors have sincerely tried to comply with the Act but, due to its increasing complexity and frequent changes, have nonetheless found themselves in violation and subject to litigation." S. Rep. 96-368, at 16, *as reprinted in* 1980 U.S.C.C.A.N. 236, 252. Congress responded by "mak[ing] compliance easier for creditors" and "limit[ing] civil liability for statutory penalties to only significant violations." *Id.* at 17; 1980 U.S.C.C.A.N. 236, 252; *see* Pub. L. 96-221, §§ 605-606, 610, 611, 613-14 (simplifying requirements); *id.* § 615(b) (limiting statutory damages remedy).

In the same vein, Congress amended "the defense for bona fide errors . . . to provide that a bona fide error may include calculation and clerical errors *as well as* computer errors and faulty programing. . . ." S. Rep. 96-368, at 32, *as reprinted in* 1980 U.S.C.C.A.N. 236, 268 (emphasis added); *see* Pub. L. 96-221, § 615(a) (adding statement that "[e]xamples of a bona fide error include, but are not limited to, clerical, calculation, computer malfunction and programing, and printing errors. . . ."). Thus, consistent with other provisions easing lenders' burdens, it appears that Congress intended the new language to make clear that the bona fide error defense was *broader* than some might have thought, in that it covered not simply calculation and clerical errors but also errors caused by the increasing use of computers in the late 1970s and early 1980s.

The reference to legal errors that immediately followed simply made clear that while the defense applied broadly to all kinds of non-legal errors, including those arising from new forms of technology,

the amendment should not be read as going so far as to overturn the established rule that ignorance of the law is not protected (even if, for example, a legal error affected how a computer was programmed). *See* Pub. L. 96-221, § 615(a) (". . . *except* that an error of legal judgment with respect to a person's obligations under this subchapter is not a bona fide error.") (emphasis added). A Senate report thus stated that the bona fide error provision "has been *clarified* to make clear that it applies to mechanical and computer errors, *provided* they are not the result of erroneous legal judgments as to the Act's requirements." S. Rep. 96-73 at 7-8, *as reprinted in* 1980 U.S.C.C.A.N. 280, 285-86 (emphasis added).

Second, the 1980 legislation did not change the operative language of the defense. Both before and after the amendment, defendants were required to prove that the error was "not intentional," that it was the result of a "bona fide error," and that they maintained procedures "reasonably adapted to avoid such errors." *Compare* 15 U.S.C. § 1640(c) (1968) *with* 15 U.S.C. § 1640(c). That Congress did not change the language describing the elements of the defense strongly indicates that it intended the legislation to clarify its original meaning and codify existing interpretations, not to effect a wholesale revision of its application to legal errors.

Third, Congress's failure to add similar language to the FDCPA does not demonstrate that it intended the same operative language in the two statutes to mean two very different things.

It may be that in an ideal world, Congress would have amended the FDCPA to include the TILA's clarifying language. In all likelihood, the issue never

occurred to Congress, which was then focused on the statute before it and the problems in the lending industry. But even if it had, Congress would have realized that it did not need to amend the FDCPA to ensure that its bona fide error defense would continue to exclude legal errors. Congress would have understood that even after the 1980 amendment to the TILA, courts construing the FDCPA would look to the meaning its language had at the time of its enactment. *See, e.g.*, *United States v. United Mine Workers of Am.*, 330 U.S. 258, 282 (1947). In doing so, those courts would see that when the FDCPA was written, the TILA's bona fide error defense was uniformly held to exclude legal errors. *See supra* at 22. They would have assumed that in using the same language as in the TILA, Congress intended to exclude mistakes of law under the FDCPA as well. *See, e.g.*, *Rowe v. N.H. Motor Transp. Ass'n*, 128 S. Ct. 989, 994 (2008) (explaining that when courts "have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its judicial interpretations as well"); *Cannon v. Univ. of Chicago*, 441 U.S. 677, 696-97 (1979) (same). As a result, Congress would have expected that even if it did not amend the FDCPA in 1980, courts would nonetheless conclude that the language as enacted did not encompass legal errors.

Fourth, neither the Sixth Circuit nor respondents have suggested any reason why Congress would have wanted ignorance of the law to be a defense under the FDCPA, but not the TILA. One would think that, if anything, it would be the other way around. After all, the TILA's requirements are far more

complicated and therefore more likely to lead to good faith violations. *See, e.g.*, *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 (1980) (noting that the TILA is "highly technical"). And, frankly, as between lenders and debt collectors, it seems unlikely that Congress would be more sympathetic to the debt collection industry.

But even if respondents could come up with an explanation for the difference between these two statutes, their work would be just beginning. For Congress has included a similarly worded bona fide error defense in five provisions of four other statutes (including the now-repealed ESAA). Two of those provisions are part of the Electronic Fund Transfer Act, which – like the FDCPA – was on the books when Congress amended the TILA. *See* 15 U.S.C. §§ 1693m(c), 1693h(c) (reproduced at App. 6a). Yet Congress did not change the language of those provisions either. Nor did Congress include the TILA's 1980 language in the bona fide error defense of the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2607(d)(3) (reproduced at App. 7a), passed in 1983.[19] But it *did* include the language

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[19] Congress delegated RESPA rulemaking authority to the Secretary of the Department of Housing and Urban Development. 12 U.S.C. § 2607(d)(4). The resulting notice-and-comment regulations provide that an "error of legal judgment with respect to a person's obligations under RESPA is not a bona fide error." 24 C.F.R. § 3500.15(b)(1)(ii). For the reasons stated above, that construction of the language of the Act is entirely reasonable and therefore binding with respect to the meaning of RESPA. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984). While it obviously is not authoritative with respect to the FDCPA, this

from the TILA's amendment in the Expedited Funds Availability Act, 12 U.S.C. § 4010(c) (reproduced at App. 8a).

Developing a unifying theory of why Congress would want to exclude mistake of law defenses under two of these six statutes, but not the others, would be a truly daunting task. The far more likely conclusion is that Congress has intended all along that the nearly identical operative language in all six statutes would be given the same interpretation, whether it remembered to include the TILA's clarifying language or not.

B. If Anything, The Amendment To The TILA Confirms That The FDCPA Provides No Defense For Legal Errors.

In the end, "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one," *United States v. Price*, 361 U.S. 304, 313 (1960), particularly when the subsequent Congress expresses that view through an amendment to an entirely different statute. But to the extent the 1980 amendment to the TILA sheds any relevant light on the question presented here, it undermines rather than supports the court of appeals' decision. It is now beyond dispute that the TILA's bona fide error defense does not apply to mistakes as to that statute's meaning. And by expressing this view

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Court should avoid a decision in this case that would result in the two identically worded provisions being given different meanings.

through a clarifying and confirming amendment, rather than by changing the operative language of the defense, Congress demonstrated its understanding that mistakes of law have been excluded all along under the terms of the defense as originally enacted. And if that language has always excluded legal errors, so has the identical language in the FDCPA. *See, e.g., Rowe,* 128 S. Ct. at 994.

V. The Bona Fide Error Defense Does Not Apply To Legal Mistakes, Regardless Of The Source Of Law.

The mistake of law at issue in this case is a misunderstanding of the FDCPA's own requirements. As a result, petitioner has focused thus far on the question whether a mistake about the meaning of the FDCPA itself can be excused under the bona fide error defense. But in other cases, defendants have sought refuge under the bona fide error defense when mistakes as to the meaning of other law led them to violate the FDCPA. For example, in *Johnson v. Riddle*, 305 F.3d 1107 (10th Cir. 2002) (*Riddle I*), the defendant alleged that its misconstruction of Utah's dishonored check statute led it to attempt to collect an amount not permitted by law, in violation of Section 1692f(1) of the FDCPA. *See* 305 F.3d at 1110-11. While this Court need not resolve the Act's application to such cases here, if it does address the question, the Court should conclude that the bona fide error defense is categorically unavailable for any mistake of law.

Admittedly, some of petitioner's arguments for declining to apply the bona fide error defense to mistakes about the FDCPA's meaning do not apply

with the same force to mistakes about other state and federal statutes. Allowing a "mistake of state law" defense, for example, would not render the safe harbor defense superfluous. *See supra* Part II. And to the extent the Court looks to the amended version of the TILA to construe the meaning of the FDCPA, that statute provides only that its bona fide error defense does not include errors regarding a "person's obligations under this subchapter," 15 U.S.C. § 1640(c), although it does not appear that this language was intended to overturn the prior judicial consensus that the defense is unavailable for legal mistakes generally. *See supra* at 22.

In any event, petitioner's remaining arguments are sufficient. Most prominently, the presumption that ignorance of the law is no defense applies without regard to the source of the law the defendant misunderstood. There was no suggestion in *Riddle*, for example, that a good faith misunderstanding of Utah's dishonored check statute would excuse a violation of that statute as a matter of state law. 305 F.3d at 1119-21. And it would be odd for Congress to excuse mistakes of state law that states themselves ordinarily would not forgive. Nor is there any reason to believe that Congress would have intended to preclude a defense based on a misunderstanding of the FDCPA, yet allow a defense when the defendant violates the Act based on a misunderstanding of state law.

If Congress had intended otherwise, it presumably would have expressed that intent in clear language. Instead, the statute speaks in terms of violations that are "not intentional," language best understood to refer to defendants' intentions with

respect to their conduct, rather than the legality of their actions. *See supra* at 17-22. Moreover, asking whether debt collectors have maintained procedures reasonably adapted to avoid mistakes a state law would invade even further the traditional responsibility of states to set standards for the professional conduct of their lawyers.

Finally, the basic purposes of the FDCPA would be undermined if defendants could evade responsibility for their violations by adverting to mistakes of state law or a misconstruction of another federal statute. *See supra* at 31-34. The harm to consumers does not depend on the source of the collector's legal mistake. And extending the bona fide error defense to mistakes of law of any sort risks encouraging debt collectors to err on the side of aggressive practices whenever there is any genuine dispute about the scope of consumers' rights.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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APPENDIX

APPENDIX

Fair Debt Collection Practices Act

15 U.S.C. § 1692k

1692k. Civil liability

(a) Amount of damages

Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person in an amount equal to the sum of--

(1) any actual damage sustained by such person as a result of such failure;

(2)(A) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding $1,000; or

(B) in the case of a class action, (i) such amount for each named plaintiff as could be recovered under subparagraph (A), and (ii) such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of $500,000 or 1 per centum of the net worth of the debt collector; and

(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.

(b) Factors considered by court

In determining the amount of liability in any action under subsection (a) of this section, the court shall consider, among other relevant factors--

(1) in any individual action under subsection (a)(2)(A) of this section, the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which such noncompliance was intentional; or

(2) in any class action under subsection (a)(2)(B) of this section, the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, the resources of the debt collector, the number of persons adversely affected, and the extent to which the debt collector's noncompliance was intentional.

(c) Intent

A debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

(d) Jurisdiction

An action to enforce any liability created by this subchapter may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within one year from the date on which the violation occurs.

(e) Advisory opinions of Commission

No provision of this section imposing any liability shall apply to any act done or omitted in good faith in conformity with any advisory opinion of the Commission, notwithstanding that after such act or omission has occurred, such opinion is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

Truth in Lending Act

15 U.S.C. § 1640(c) (1968)

(As originally enacted)

(c) Unintentional violations; bona fide errors

A creditor or assignee may not be held liable in any action brought under this section or section 1635 of this title for a violation of this subchapter if the creditor or assignee shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

Truth in Lending Act

15 U.S.C. § 1640(c)

(As amended)

(c) Unintentional violations; bona fide errors

A creditor or assignee may not be held liable in any action brought under this section or section 1635 of this title for a violation of this subchapter if the creditor or assignee shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error. Examples of a bona fide error include, but are not limited to, clerical, calculation, computer malfunction and programing, and printing errors, except that an error of legal judgment with respect to a person's obligations under this subchapter is not a bona fide error.

Economic Stabilization Act Amendments of 1971

Pub. L. 92-210, 85 Stat. 748, § 210

In any action brought under subsection (a) against any person renting property or selling goods or services who is found to have overcharged the plaintiff, the court may, in its discretion, award the plaintiff reasonable attorney's fees and costs, plus whichever of the following sums is greater:

(1) an amount not more than three times the amount of the overcharge upon which the action is based, or

(2) not less than $100 or more than $1000;

except that in any case where the defendant establishes that the overcharge was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to the avoidance of such error the liability of the defendant shall be limited to the amount of the overcharge; Provided, That where the overcharge is not willful within the meaning of section 208(a) of this title, no action for an overcharge may be brought by or on behalf of any person unless such person has first presented to the seller or renter a bona fide claim for refund of the overcharge and has not received repayment of such overcharge within ninety days from the date of the presentation of such claim.

Electronic Fund Transfer Act

15 U.S.C. §§ 1693m, 1693h

§ 1693m. Civil Liability

* * *

(c) Unintentional violations; bona fide error

Except as provided in section 1693h of this title, a person may not be held liable in any action brought under this section for a violation of this subchapter if the person shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

* * *

§ 1693h. Liability of financial institutions

* * *

(c) Intent

In the case of a failure described in subsection (a) of this section which was not intentional and which resulted from a bona fide error, notwithstanding the maintenance of procedures reasonably adapted to avoid any such error, the financial institution shall be liable for actual damages proved.

Real Estate Settlement Procedures Act

12 U.S.C. § 2607(d)(3)

(d) Penalties for violations; joint and several liability; treble damages; actions for injunction by Secretary and by State officials; costs and attorney fees; construction of State laws

* * *

No person or persons shall be liable for a violation of the provisions of subsection (c)(4)(A) of this section if such person or persons proves by a preponderance of the evidence that such violation was not intentional and resulted from a bona fide error notwithstanding maintenance of procedures that are reasonably adapted to avoid such error.

Expedited Funds Availability Act

12 U.S.C. § 4010(c)

(c) Bona fide errors

(1) General rule

A depository institution may not be held liable in any action brought under this section for a violation of this chapter if the depository institution demonstrates by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error, notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

(2) Examples

Examples of a bona fide error include clerical, calculation, computer malfunction and programming, and printing errors, except that an error of legal judgment with respect to a depository institution's obligation under this chapter is not a bona fide error.

RESPONDENT'S BRIEF

No. 08-1200

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In The
Supreme Court of the United States

KAREN L. JERMAN,

Petitioner,

v.

CARLISLE, McNELLIE, RINI, KRAMER & ULRICH, L.P.A. AND ADRIENNE S. FOSTER,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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QUESTION PRESENTED

Whether a debt collector's legal error qualifies for the bona fide error defense under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692k(c).

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BRIEF FOR THE RESPONDENTS

Respondents Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A. and Adrienne S. Foster request that this Court affirm the judgment of the United States Court of Appeals for the Sixth Circuit.

STATEMENT OF THE CASE

Congress's expressed purpose in enacting the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.*, was to eliminate abusive debt collection practices while not competitively disadvantaging debt collectors. *See* 15 U.S.C. § 1692(e). The FDCPA imposes liability on a debt collector who violates the statute. *See* 15 U.S.C. § 1692k(a). The debt collector, in turn, may avoid liability by proving that the "violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." *See* 15 U.S.C. § 1692k(c) ("bona fide error defense" or "FDCPA defense").

1. Respondent Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A. is an Ohio law firm concentrating in real estate and foreclosure law. Respondent Adrienne S. Foster was an associate attorney at the firm. Amended Joint Appendix, 87 [hereinafter Joint App.].[1] The law

[1] The Amended Joint Appendix was filed with the Sixth Circuit Court of Appeals on January 11, 2008.

firm's senior principal, Richard McNellie, was responsible for the firm's compliance with the FDCPA. Joint App. 89. McNellie regularly attended industry seminars and conferences on issues relating to the FDCPA. *Id.* The firm subscribed to and circulated numerous periodicals and journals updating firm personnel on relevant developments. *Id.* McNellie periodically modified the firm's FDCPA protocols to comply with evolving case law, including the content of the validation notice required under 15 U.S.C. § 1692g. *Id.* at 90.

2. One question of law that was debated under the FDCPA was whether a debt collector who sends a validation notice may require a consumer to dispute a debt "in writing" under § 1692g(a)(3). In 2004, the Sixth Circuit affirmed a district court decision that authorized debt collectors to require written notice of a dispute. *See Savage v. Hatcher*, 109 Fed.Appx. 759 (6th Cir. 2004), *aff'g Savage v. Hatcher*, No. C-2-01-0089, 2002 WL 484986 (S.D. Ohio 2002). The only other court within the Sixth Circuit to analyze the issue also held that inclusion of the words "in writing" in a validation notice did not violate the FDCPA. *See Diamond v. Corcoran*, No. 5:92-CV-36, 1992 U.S. Dist. Lexis 22793 at *5-6 (W.D. Mich. 1992) (citing *Graziano v. Harrison*, 950 F.2d 107, 112 (3rd Cir. 1991) (holding that "given the entire structure of section 1692g, subsection (a)(3) must be read to

require that a dispute, to be effective, must be in writing")).[2]

3. On April 17, 2006, respondents filed a foreclosure action against petitioner Karen L. Jerman on behalf of their mortgage lender-client. Joint App. 87. Along with the summons and complaint, respondents served petitioner with the firm's validation notice which stated, in part, that the debt would be assumed valid unless the debtor disputed the validity of the debt in writing within thirty days. *Id.* Petitioner retained a lawyer who sent a letter disputing the debt. *Id.* Respondents investigated, discovered from their client that the debt had recently been paid, and dismissed the foreclosure action. *Id.* at 88. The action was pending for twenty-four days. *Id.*

4. Petitioner then filed a class action complaint against respondents for various "unlawful debt collection practices." Joint App. 7. Respondents filed a motion to dismiss the complaint on the basis that inclusion of "in writing" in the notice did not violate the FDCPA. Joint App. 14-20. Despite the fact that all authority within the Sixth Circuit supported respondents' position, the district court found that "the plain meaning of the statute is clear and unambiguous," it did not impose a writing requirement on consumers

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[2] Sections 1692g(a)(4) and 1692g(a)(5) contain writing requirements. In addition, § 1692c(c) provides consumers with certain rights if they notify a debt collector "in writing."

and, therefore, respondents' validation notice violated § 1692g(a)(3). Joint App. 256-262.

After informal discovery, petitioner filed an amended class action complaint alleging one violation – that the validation notice sent to petitioner violated § 1692g(a)(3) by requiring her to dispute the debt "in writing," citing *Camacho v. Bridgeport Fin. Inc.*, 430 F.3d 1078 (9th Cir. 2005).[3] *Id.* at 61. Petitioner sought: (1) class certification for all Ohio consumers who received a validation notice requiring written notification of a dispute on or after June 6, 2005; (2) actual damages; (3) penalties consisting of the lesser of either $500,000 or one percent of respondents' net worth; and (4) attorney's fees.[4] *Id.* at 64. Respondents denied the alleged violation and further raised the affirmative defense of bona fide error. *Id.* at 66-70.

Respondents then moved for summary judgment on the ground that the bona fide error defense absolved them of liability as a matter of law. *Id.* 71-86. The

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[3] In her Merit Brief, petitioner asserts that *Camacho* is the "only on-point" appellate decision to consider whether a validation notice could properly require written notification of a dispute. *See* Brief for the Petitioner, p. 6 n.1 [hereinafter Pet. Merit Br.]. This is incorrect. After filing her Brief, petitioner notified respondents that her interpretation of *Graziano v. Harrison*, 950 F.2d 107 (3rd Cir. 1991) was mistaken and acknowledged that the Third Circuit explicitly addressed the issue.

[4] Petitioner immediately sought information from respondents concerning their income and thereafter proposed a settlement that included payment of $15,000 for damages, plus $7,500 for attorney's fees. Joint App. 256-262.

district court granted summary judgment. Appendix to Petition for Writ of Certiorari, 19a-41a [hereinafter Pet. App.]. In deciding the threshold issue, the court joined the "growing majority of courts" in concluding that the bona fide error defense encompasses legal error. Pet. App. 32a-33a (citing *Johnson v. Riddle*, 305 F.3d 1107 (10th Cir. 2002); *Jenkins v. Heintz*, 124 F.3d 824 (7th Cir. 1997)).

Next, the district court found that respondents met their evidentiary burden on each of the three showings required under § 1692k(c). The court found that there was no issue of fact as to whether respondents intentionally violated the FDCPA. The court noted that the law on the issue was unsettled, that respondents' reliance on *Graziano* and *Diamond* was reasonable, "and little guidance was provided by the Sixth Circuit." Pet. App. 36a. The court also found that respondents' error was made in good faith because existing authority within the jurisdiction supported their interpretation of § 1692g(a)(3). Pet. App. 37a. Finally, the court concluded that no reasonable procedures could have "lead [respondents] to know that this Court would find an FDCPA violation in the validation notice" and that respondents maintained reasonable procedures adapted to avoid the error. Pet. App. 39a-40a.

5. The Sixth Circuit unanimously affirmed. Pet. App. 1a-18a. While acknowledging that the circuit courts were "divided," the Sixth Circuit observed that those courts which adopted a restrictive view of the defense had failed to thoroughly examine the relevant

issues, and instead "simply dispense[d] with the issue" in reliance on the Ninth Circuit's decision in *Baker*.[5] *Id.* at 8a. As the Sixth Circuit observed, *Baker* "rested its holding entirely" upon the flawed analogy to the bona fide error defense contained in the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq*. Pet. App. 8a (citing *Johnson,* 305 F.3d at 1122). The Sixth Circuit further recognized "that the plain language of the FDCPA suggests no intent to limit the bona fide error defense to clerical errors." Pet. App. 9a-10a (quoting *Johnson*, 305 F.3d at 1123). Finally, the court concluded that protection of attorneys who make bona fide errors of law is consistent with the FDCPA's purpose of eliminating abusive debt collection practices, while also insuring that debt collectors are not competitively disadvantaged. Pet. App. 14a. Petitioner's en banc request was denied. Pet. App. 42a-43a.

This Court granted certiorari on the sole question of whether legal error qualifies for the bona fide error defense. Petitioner has not appealed the factual findings of the Sixth Circuit that respondents' violation of § 1692g(a)(3) was not intentional and resulted from their good faith interpretation of § 1692g(a)(3), notwithstanding the maintenance of procedures reasonably adapted to avoid such error.

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[5] *Baker v. G. C. Servs. Corp.*, 677 F.2d 775 (9th Cir. 1982).

SUMMARY OF ARGUMENT

1. A plain text analysis of the bona fide error defense in § 1692k(c) shows that it applies to all types of error. The defense refers to "error" without restriction or limitation. A plain reading of the words and phrases "bona fide," "violation not intentional" and "maintenance of procedures reasonably adapted," in context, does not show a congressional intent to exclude legal error from the word "error." Exclusion of legal error from the bona fide error defense has no support in the text and would be contrary to the purposes of the statute (eliminating abusive debt collection practices while not competitively disadvantaging nonabusive debt collectors).

2. The safe harbor provision of the FDCPA does not indicate a congressional intent that legal errors be excluded from the bona fide error defense. Including legal errors in § 1692k(c) does not render the safe harbor provision superfluous. Each contains separate and distinct requirements that are available to debt collectors depending upon the circumstances. Given the internal rules of the Federal Trade Commission ("FTC") providing that advisory opinions will be issued "where practicable" and where there is "no clear Commission or court precedent," the dearth of FTC opinions is understandable. Because advisory opinions are not binding on courts, ethical dilemmas may arise if lawyers are required to choose between the categorical immunity afforded to them by the safe harbor provision and advancing the best interests of

their client by arguing existing case precedent inconsistent with the advisory opinion.

3. A plain reading of the bona fide error defense to include legal errors is consistent with the purpose of the statute. Congress expressed an intent to equitably balance the interests of consumers and debt collectors in the purposes of the statute. *See* 15 U.S.C. § 1692(e).

The statutory elements favoring consumers include: a wide range of "violations," most of which do not require proof of a culpable mindset, the availability of damages in excess of actual damages sustained, the availability of substantial class action damages, "reasonable" attorney's fees, even in the absence of proof of actual damages and stiff administrative penalties.

The counterbalances afforded debt collectors are the safe harbor provision and bona fide error defense (that applies to legal and other errors), as well as § 1692k(a)(3) (that allows debt collectors to recover reasonable attorney fees from consumers for actions brought in bad faith).

Requiring a debt collector to prove the three elements of the defense by a preponderance of the evidence furthers the purpose of protecting debt collectors who attempt to comply with the FDCPA, while still discouraging abusive conduct.

The checks and balances built into the FDCPA, including a bona fide error defense that applies to

legal and other errors, has and will continue to prevent a "race to the bottom" by either consumers or debt collectors.

Lastly, this Court's holding in *Heintz v. Jenkins*, 514 U.S. 291 (1995), further compels the conclusion that the bona fide error defense encompasses legal errors.

4. There is nothing in TILA that warrants disturbing the plain meaning of the FDCPA defense so as to exclude legal errors. TILA provides creditors with multiple means for curing violations prior to the imposition of liability. These safeguards are not present in the FDCPA. Thus, this Court should not look to the bona fide error provision in TILA for guidance.

Reliance on TILA in interpreting the FDCPA bona fide error defense is misplaced because the judicial interpretations of TILA's bona fide error defense were unsettled at the time the FDCPA was enacted. When enacting the FDCPA, Congress did not express any intent that the bona fide error defense should be construed consistent with existing TILA case precedent. The legislative purposes and history of the FDCPA and TILA are significantly different and show that Congress did not intend to adopt any particular interpretation of TILA's bona fide error defense when enacting the FDCPA.

The 1980 TILA amendments do not support finding a congressional intent to exclude legal error

from the FDCPA defense. Rather, the TILA amendments demonstrate that Congress knows how to express an intent to exclude legal errors from a bona fide error defense and has chosen not to do so with the FDCPA, despite numerous opportunities.

5. Petitioner's interpretation of the FDCPA defense to exclude all legal error breaks down when the definition of legal error is expanded beyond a determination of the requirements of the FDCPA. Petitioner concedes that her definition of legal error would cause disharmony in those cases where the FDCPA is inconsistent with other state or federal statutes.

Petitioner's arguments presuppose that ethical and unethical debt collectors should be treated identically, that intent to violate the statute is not of consequence, and that it is equally blameworthy for a lawyer to rely on law which is later overturned as it is to fail to become educated. These positions are each belied by the FDCPA's bona fide error defense as written.

ARGUMENT

I. THE PLAIN TEXT OF THE FDCPA REQUIRES THAT LEGAL ERRORS BE INCLUDED IN THE BONA FIDE ERROR DEFENSE

Section 1692k(c) provides:

> A debt collector may not be held liable in any action brought under this subsection if the debt collector shows by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

A growing majority of federal courts have concluded that "nothing in the language of the FDCPA bona fide error provision limits the reach of the defense to clerical errors and other mistakes not involving the exercise of legal judgment." *Nielsen v. Dickerson*, 307 F.3d 623, 641 (7th Cir. 2002). In fact, respondents are unaware of a single decision that excludes legal errors from the bona fide error defense based on a plain text analysis. It is not surprising then that petitioner, in her effort to remove legal error from the plain language of the statute, advocates a construction that is governed by a criminal law maxim and is dependent upon an interpretation of other federal statutes that neither contain the same relevant language nor were promulgated for a similar purpose. Petitioner's failure to focus on the actual text of the statute is

understandable given that a plain reading of the statute leads to only one conclusion – that the bona fide error defense includes legal errors.

This Court has long recognized that "[t]he pre-eminent canon of statutory interpretation requires [courts] to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.'" *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (quoting *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992)). Thus, when interpreting language used by Congress in the absence of statutory definitions, courts construe words in accordance with their ordinary and natural meanings, in context, and with a view of their place in the overall statutory scheme. *See F.D.I.C. v. Meyer*, 510 U.S. 471, 476 (1994); *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989). Further, "[w]here there is no ambiguity in the words, there is no room for construction [and, as such] a case must be a strong one indeed, which would justify a court in departing from the plain meaning of words . . . in search of an intention which the words themselves did not suggest." *United States v. Gonzales*, 520 U.S. 1, 8 (1997) (citing *United States v. Wiltberger*, 18 U.S. 76, 95-96 (1820)).

Consequently, "[i]t is well established that 'when the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms.'" *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) (quoting *Hartford Underwriters Ins. Co. v.*

Union Planters Bank, N. A., 530 U.S. 1, 6 (2000), in turn quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989), in turn quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

A. Application Of The Bona Fide Error Defense To Legal Errors Is Consistent With A Plain Reading Of The Express Purposes Of The FDCPA

Bearing in mind these principles of statutory construction, a plain text analysis of the bona fide error provision should begin with a recognition of the stated purposes of the FDCPA. Contrary to petitioner's repeated assertion, the FDCPA was not enacted for the singular purpose of preventing abusive debt collection practices. Instead, Congress expressly declared that the legislation was intended to address three interests:

> It is the purpose of this subchapter *to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from abusive debt collection practices are not competitively disadvantaged*, and to promote consistent State action to protect consumers against debt collection abuses.

15 U.S.C. § 1692(e) (emphasis added).

Given these purposes of the FDCPA, the bona fide error defense was unquestionably part of Congress's effort to carefully balance the interest of

eliminating abusive debt collection practices while also insuring that scrupulous debt collectors are protected.

B. A Plain Reading Of The Bona Fide Error Defense Includes Legal Errors

Section 1692k(c) is an affirmative defense requiring debt collectors to prove that their "violation" of the FDCPA was: (1) not intentional; and (2) resulted from a bona fide error; (3) notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

Petitioner argues that the bona fide error defense excludes legal error. Her argument is based on an interpretation of the phrase "violation was not intentional," which she contends can only mean one of two things: (1) that the "act" constituting the violation (or infraction) of the statute was not intentional; or (2) that the actual violation (or infraction) of the statute itself was not intentional.[6] Petitioner claims that the phrase must be restricted to her first definition.[7] Petitioner's argument requires the

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[6] Petitioner also argues that the phrase "maintenance of procedures reasonably adapted to avoid any such error" reinforces the conclusion that the bona fide error defense excludes legal error. This argument is addressed in Part I.E.

[7] Petitioner's argument is contrary to numerous decisions finding that a debt collector must only show that the violation was unintentional, not the act itself was unintentional. *See, e.g., Lewis v. ACB Bus. Servs., Inc.*, 135 F.3d 389, 402 (6th Cir. 1998)

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addition of words to the plain language of the statute along the lines of:

> A debt collector may not be held liable in any action brought under this subsection if the debt collector shows by a preponderance of the evidence that the [*act constituting the*] violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

Relying on these inserted words, petitioner asserts that because every legal error results from an intentional act, such an error would never qualify for the bona fide error defense.

The plain language of the bona fide error defense, however, does not restrict the phrase "violation was not intentional" to the "act" constituting the violation. Because the only term in § 1692k(c) that is statutorily defined is "debt collector," the meaning of the other words and terms in this provision must necessarily be derived from their common usage. *See* 15 U.S.C. § 1692a.

("The debt collector must only show that the violation was unintentional, not that the communication itself was unintentional. To hold otherwise would effectively negate the bona fide error defense."); *Johnson v. Riddle*, 305 F.3d 1107 (10th Cir. 2002); *Caputo v. Prof'l Recovery Servs., Inc.*, 261 F.Supp.2d 1249, 1255 (D. Kan. 2003). It is also contrary to the legislative history. *See* S. Rep. No. 95-382, at 4-5 (1977) ("A debt collector has no liability . . . when such violation is unintentional. . . .").

As commonly used, "violation" means "[t]he act or an instance of violating or *the condition of being violated*." THE AMERICAN HERITAGE COLLEGE DICTIONARY 1507 (3rd ed. 1997) (emphasis added). Synonyms include "breach, infraction, violation, transgression, trespass and infringement." *Id.* at 171. Thus, the common meaning of "violation" encompasses not only the "act" constituting an infraction, but also the actual "condition being violated," i.e., the infraction or violation itself.

The word "violation" is modified two times in § 1692k(c). First, "violation" is modified by the phrase "not intentional." As commonly used, "intentional" is defined as "[d]one deliberately; intended." *Id.* at 707. Synonyms include "voluntary, intentional, deliberate, *willful, willingly*." *Id.* at 1513 (emphasis added). Again, nothing in the language of the adjective "intentional" suggests that "violation" is restricted to the "act" as opposed to the "infraction" itself.

Second, "violation" is modified by the phrase "and resulted from a bona fide error." "Bona fide" is defined as "[m]ade or carried out in good faith; sincere." *Id.* at 158. "Error" commonly means "1. [a]n act, an assertion, or *a belief* that unintentionally deviates from what is correct, right, or true. 2. *The condition of having incorrect or false knowledge*. 3. The act or an instance of deviating from an accepted code of behavior. 4. A mistake." *Id.* at 467 (emphasis added). Stated differently, "error" includes not only an "act" that deviates from what is correct, but also a "belief." Once more, nothing in the plain meaning of either

"bona fide" or "error" modifies "violation" in a manner consistent with petitioner's restrictive interpretation. "Error" means all types of errors without restriction or limitation.

Further, there is nothing in the common usage of the words contained in the phrase "notwithstanding the maintenance of procedures reasonably adapted to avoid any such error" that indicates a "violation" is restricted to the "act" constituting the violation. In fact, just the opposite is true as the phrase refers to "any such error."

In sum, petitioner removes legal error from the plain language of the bona fide error defense by reading words into the provision. Petitioner wants to have it both ways. At petitioner's urging, the district court refused to add the words "in writing" to the plain and unambiguous language of § 1692g(a)(3). Petitioner now seeks to insert the words "act constituting the" violation into the plain and unambiguous language of the bona fide error defense in order to deny respondents the benefit of the defense.

As indicated above, however, "[i]t is well established that when the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms." *Lamie,* 540 U.S. at 534 (internal quotations omitted) (citations omitted). Given the number of federal courts that have specifically determined that the bona fide error defense does not exclude legal error, it cannot be

reasonably argued that the result of this interpretation is absurd.

C. Petitioner's Attempt To Remove Legal Errors From The Bona Fide Error Defense Is Inconsistent With A Plain Reading Of The Text Of The FDCPA

1. Congress could have limited the bona fide error defense to an "act."

When viewed in the context of the plain language of the FDCPA, the bona fide error defense does not restrict the phrase "violation was not intentional" to an "act" constituting the violation of the statute. A review of the FDCPA's safe harbor provision at § 1692k(e) reveals that when Congress intended to limit application of a defense to an "act," it knew how to do so. Section 1692k(e) provides:

> No provision of this section imposing any liability shall apply to any *act done or omitted* in good faith in conformity with any advisory opinion of the Commission, notwithstanding that after such *act or omission* has occurred, such opinion is amended, rescinded, or determined by judicial or other authority to be invalid for any reason. (Emphasis added).

Had Congress intended to limit the bona fide error defense to an unintentional "act or omission," it could have used language consistent with § 1692k(e).

2. Petitioner's restrictive interpretation of the bona fide error defense fails to harmonize the defense with other provisions within the FDCPA.

Petitioner's interpretation of the phrase "violation was not intentional" renders the bona fide error defense meaningless as to various violations enumerated in the FDCPA. Petitioner's position not only fails to give due credence to the language of all provisions contained in the FDCPA, but it also fails to interpret the statute so that each provision operates in harmony with the other. *See Thomas v. Crosby*, 371 F.3d 782, 811 (11th Cir. 2004) ("Courts undoubtedly have an obligation to harmonize the various provisions within a statutory scheme.").

The requirement that a debt collector must have a culpable mindset of either knowledge or intent to commit an "act" that violates one of the provisions of the FDCPA varies. In this case, petitioner alleged respondents violated § 1692g(a)(3). This subsection provides that within five days of an initial communication, a debt collector shall send:

> [A] statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector[.]

The district court determined that respondents' validation notice requiring a written response from the consumer violated the FDCPA. Joint App. 60.

Section 1692g(a)(3) is violated by an act alone. Other provisions require more – proof of an act coupled with a culpable mindset, i.e., knowledge and/or intent to commit the act. For example, § 1692d(5) identifies a violation as conduct "[c]ausing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously *with intent* to annoy, abuse or harass. . . ."[8] (Emphasis added). The fact that some violations require a "knowing" or "intentional" mindset is problematic with respect to application of the bona fide error defense.

A dilemma arises when attempting to reconcile the defense's applicability to "any action brought under this subchapter," with violations requiring proof of a knowing or intentional mindset. By way of example, if a plaintiff proves that a debt collector violated § 1692d(5) by: (1) "engaging . . . in [a] telephone conversation repeatedly or continuously;" and (2) "with intent to annoy, abuse, or harass . . . ;" then, under the petitioner's narrow interpretation, the bona fide error defense is rendered per se meaningless because the debt collector could never prove that the "act" was not intentional in the context of the affirmative defense. While intent to annoy, abuse, or harass may be inferred from the frequency of phone calls, the substance of the phone call or the

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[8] Other examples of similar provisions include §§ 1692b(6); 1692c(1); 1692c(2); 1692c(3); 1692c(8); 1692f(2); 1692f(6)(B); and 1692j(a).

place to where phone calls are made,[9] a debt collector could never establish that he did not intend to commit the act that violated this provision because the consumer would have already established this fact in proving the violation.

This apparent conflict between the bona fide error defense and certain other provisions within the FDCPA is removed when one gives meaning to the plain text of § 1692k(c) to include all bona fide errors. Under this construction, when a particular violation requires a debtor to prove only that the act was committed, then the bona fide error defense can be asserted by the debt collector to prove that either the act constituting the violation, or the violation itself, "was not intentional and resulted from bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." When a particular violation, however, requires a debtor to prove both that an act was committed and that it was committed with knowledge and/or intent, the bona fide error defense can only logically be asserted by the debt collector to prove that the violation itself "was not intentional and resulted from bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error."

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[9] *See Kuhn v. Account Control Tech.*, 865 F.Supp 1443, 1452-53 (D. Nev. 1994); *Chiverton v. Fed. Fin. Group, Inc.*, 399 F.Supp.2d 96, 101 (D. Conn. 2005); *Pittman v. J.J. MacIntyre Co. of Nevada, Inc.*, 969 F.Supp. 609, 612 (D. Nev. 1997).

By way of the above example, while the debtor may prove that the debt collector violated § 1692d(5) by "engaging . . . in [a] telephone conversation repeatedly or continuously with intent to annoy, abuse or harass . . . ," this "act or conduct" may have been premised on case precedent holding that such conduct did not violate the FDCPA. As the bona fide error defense is applicable to "any action brought under this subchapter," the debt collector must be permitted to show that the violation or infraction "was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error."

3. Interpreting "violation not intentional" to exclude legal error conflicts with similar language in § 1692k(b).

Petitioner's interpretation of the phrase "violation was not *intentional*" leads to similar problems when construed with the phrase "the extent to which the debt collector's non-compliance was *intentional*" in § 1692k(b). (Emphasis added).

Section 1692k sets forth the parameters of a debt collector's civil liability for FDCPA violations. The damage sections would apply where a debt collector was found to have violated an FDCPA provision and was unsuccessful in asserting either the bona fide error or safe harbor defenses. Section 1692k(a) provides that "any debt collector who fails to comply with

any provision of this subchapter . . . is liable. . . ." Section § 1692k(a)(1) provides that the consumer is entitled to an award of "any actual damage sustained by such person as a result of such failure." In addition to actual damages, § 1692k(a)(2)(A) permits a court to award "such additional damages as the court may allow, but not to exceed $1,000" with respect to individual violations, while § 1692k(a)(2)(B) permits additional damages "as the court may allow . . . not to exceed the lesser of $500,000 or 1 per centum of the net worth of the debt collector" for class action violations. Section 1692k(b) defines "factors" that may be considered by a court in awarding additional damages, including "the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which such noncompliance was *intentional*." *See* §§ 1692k(b)(1) and (2) (emphasis added).

"'It is a settled principle of statutory construction that "[w]hen the same word or phrase is used in the same section of an act more than once, and the meaning is clear as used in one place, it will be construed to have the same meaning in the next place."'" *Mashantucket Pequot Tribe v. Conn.*, 913 F.2d 1024, 1030 (2nd Cir. 1990) (quoting *United States v. Nunez*, 573 F.2d 769, 771 (2nd Cir. 1978), in turn quoting *Meyer v. United States*, 175 F.2d 45, 47 (2nd Cir. 1949), in turn quoting *Lewellyn v. Harbison*, 31 F.2d 740, 742 (3rd Cir. 1929)). As such, the adjective "intentional" should be read to modify "noncompliance" in § 1692k(b) in the same manner it modifies "violation"

in § 1692k(c). Under petitioner's suggested interpretation, the following words must be added to § 1692k(b):

> the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which [the act constituting] such noncompliance was intentional.

This construction again leads to an internal conflict. Using the previous example of a violation under § 1692d(5), a debt collector's intent to commit the "act" constituting a violation of the statute cannot logically be viewed as a factor justifying the assessment of additional damages under § 1692k(b). The debt collector's liability for the violation of § 1692d(5) would have, by necessity, already required proof of the debt collector's "intent to annoy, abuse, or harass." Petitioner's inconsistent construction of the adjective "intentional" is problematic when juxtaposed with the factors a court considers in awarding additional damages under § 1692k(b).

D. The Plain Language Of The Bona Fide Error Defense Does Not Exculpate Debt Collectors Who Are Ignorant Of The Law

Petitioner resorts to sources outside the plain text of the FDCPA in attempting to demonstrate that the bona fide error defense excludes legal errors. Petitioner argues that the phrase "violation was not intentional" must be restricted to "acts" constituting

an infraction of the statute, based on the criminal law maxim that "ignorance of the law is no defense." Petitioner relies on this argument as a means to inject a meaning into the bona fide error defense that is otherwise not apparent from the actual text. The reliance on this criminal law maxim is unpersuasive because it is predicated on a false premise – that respondents' error in legal judgment was the result of "ignorance of the law." The characterization of respondents' violation as "ignorance of the law" is absurd. The conduct found to be in violation of the FDCPA (the issuance of a letter requiring a response "in writing") was predicated upon a reasonable analysis of existing case law in an effort to comply with the statute.

Importantly, the bona fide error defense is not an exception to the criminal law maxim that "ignorance of the law is no defense." Although this affirmative defense includes legal errors, it excludes ignorance as a basis for establishing the defense. In ordinary English, "ignorance" means "[t]he condition of being uneducated, unaware, or uninformed." THE AMERICAN HERITAGE COLLEGE DICTIONARY 675 (3rd ed. 1997). While ignorance may be asserted to establish that a legal error was unintentional under the bona fide error defense, by its very definition, ignorance would prove that a debt collector did not act in good faith or maintain procedures reasonably adapted to avoid any such error. *See, e.g., Seeger v. AFNI*, 548 F.3d 1107, 1114 (7th Cir. 2008) (holding that the defendant's procedures to avoid the error were not reasonable

and, thus, application of the bona fide error defense would reward the defendant's ignorance of the law).

Moreover, petitioner does not cite any authority applying the criminal law maxim, "ignorance of the law is no defense," in the context of a civil statute containing an affirmative defense.[10] In fact, the very existence of the bona fide error defense in the FDCPA constitutes an expression of congressional intent that a debt collector should not be liable if the criteria of the defense are satisfied. The rigors of the bona fide error defense ensure this result. While the intent prong of the defense is a subjective test, the good faith and reasonable procedures prongs are subject to an objective test. *See Drossin v. Nat'l Action Fin. Servs.*, 641 F.Supp.2d 1314, 1321 (2009). A debt collector's satisfaction of both the subjective and objective prongs of this affirmative defense ensures that a debt collector cannot be exempted from civil liability based on "ignorance of the law."

The absurdity of petitioner's proposition is best illustrated by the holding in this case. The district court did not find that respondents were ignorant of

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[10] Further, petitioner's suggestion that the bona fide error defense operates as a "qualified immunity" is specious. A "qualified immunity" exists until such time as the immune party acts outside the scope of the immunity. *See Anderson v. Creighton*, 483 U.S. 635, 638 (1987); *see also Thomas v. Whalen*, 51 F.3d 1285, 1289 (6th Cir. 1995). The bona fide error defense, however, is not implicated until a debt collector satisfies, by a preponderance of the evidence, the three prongs of the defense.

the law – rather it found just the opposite – that respondents had knowledge and awareness of existing case law. Stated differently, respondents' violation of the statute was subjectively found to be unintentional because they relied on existing case law. In addition, their reliance was objectively found to be made in good faith while maintaining procedures reasonably adapted to avoid any such error. This is precisely why the district court concluded that "[g]iven the unsettled law that existed on this issue, no procedure could have lead defendants to know that this Court would find an FDCPA violation in the validation notice sent to plaintiff." Pet. App. 39a.

1. Petitioner's analysis of unrelated federal statutes is a red herring and based on a false premise.

Petitioner asserts that a survey of language utilized in various federal statutes demonstrates that when Congress wants to exempt a criminal or civil violation from the maxim "ignorance of the law is no defense," it does so through the use of an express term of art. Specifically, petitioner contends that when Congress uses the phrase "willful violation" in a statute, it intends the violation to require proof that a defendant acted with knowledge that his conduct was unlawful. Conversely, when Congress uses the phrase "knowing violation" in a statute, it means "'factual knowledge as distinguished from knowledge of the law.'" Pet. Merit Br. 18 (citing *Bryan v. United States*, 524 U.S. 184, 192 (1998)). According to petitioner, a

"knowing violation" only requires a showing that the "act" violating a statute was intentional – not that the violation itself was intentional. Petitioner concludes that because Congress failed to use the word "willful" in § 1692k(c), the phrase "violation was not intentional" must only require a showing that the "act" constituting the violation was not intentional.

1. This argument is a red herring for several reasons. First, it focuses on statutory language not contained in the bona fide error defense. Second, petitioner fails to cite a single case analyzing the word "intentional" in conjunction with the word "violation." Third, petitioner's "survey" does not analyze the maxim "ignorance of the law" in the context of a statutory affirmative defense. Finally, petitioner's entire discussion fails to recognize important distinctions between statutory construction of criminal and civil statutes. A proper recognition of these differences eviscerates petitioner's argument.

2. Further, petitioner's position is based on the false premise that "willful" has a distinct statutory meaning. In *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007), this Court examined use of the word "willfully" in the context of the Fair Credit Reporting Act ("FCRA") and stated "[w]e have said before that "willfully" is a "word of many meanings whose construction is often dependent on the context in which it appears." *Id.* at 57. This Court went on to note that the term "willful" has different meanings in criminal and civil statutes. In the context of a civil statute, "willfulness" generally applies to both reckless and

knowing violations. In the criminal context, "willful" means "limiting liability to knowing violations."[11] *Id.* at 59, n.9. This Court concluded that the term "knowing violations" of the FCRA must be a "more serious subcategory of willful ones," meaning that a knowing violation requires actual knowledge that the conduct was unlawful.[12] This is in direct contradiction to petitioner's argument that a "knowing violation" only requires "factual knowledge as distinguished from knowledge of the law." Pet. Merit Br. 18.

In sum, petitioner's linguistic exercise focuses on language not contained in the bona fide error defense, wrongfully presumes a standardized meaning of statutory terms, and fails to give recognition to the different usage of the terms in civil and criminal statutes. Moreover, petitioner's authority focuses on

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[11] Like petitioner, the United States argues that Congress uses the word "willfully" as a term of art when it intends to require a defendant to have knowledge of his unlawful conduct. *See* Brief for the United States as Amicus Curiae Supporting Petitioner, 11 [hereinafter U.S. Br.]. Notably, however, the United States later concedes that: "In *Bryan v. United States*, 524 U.S. 184 (1998), [the] Court rejected the contention that, in a criminal statute, 'the statutory language – "*willfully violates* any other provision of this chapter" – indicates a congressional intent to attach liability only when a defendant possesses specific knowledge of the "provision[s] of [the] chapter."'" *Id.* at 15 (emphasis added).

[12] The United States also recognized this distinction, stating that "when Congress intends for a defendant's knowledge or reckless disregard of the law to be considered, it commonly uses the term 'knowingly' or 'willfully.'" U.S. Br. 13 (citing *Safeco*, 551 U.S. at 57).

the necessary criteria to establish liability under a statute, not the elements of an affirmative defense intended to excuse liability upon proof of a good faith mistake, including legal error.

E. Procedures Reasonably Adapted To Avoid Any Such Error

1. Petitioner argues that the bona fide error defense excludes legal errors because it is "awkward" to speak in terms of maintaining procedures reasonably adapted to avoid legal errors. The fallacy of this argument was directly addressed in this case by the Sixth Circuit:

> We acknowledge that it is more common to speak of procedures adapted to avoid clerical errors than to speak of procedures adopted to avoid mistakes of law. *However, absent a clearer indication that Congress meant to limit the defense to clerical errors, we instead adhere to the unambiguous language of the statute as supported by the available legislative history. Johnson*, 305 F.3d at 1123.
>
> We agree with the persuasive reasoning and analysis set forth in *Johnson*. Indeed, debt collectors may set up "procedures" more often to avoid clerical mistakes, *but there is nothing unusual about attorney collectors maintaining procedures, such as frequent education and review of the FDCPA law, in order to avoid mistakes of law.*

Pet. App. 13a (emphasis added).

2. Petitioner also contends that the bone fide error defense should exclude legal errors because courts have struggled to define what constitutes "reasonable procedures." A court's consideration of "reasonable procedures" in the context of legal errors, however, is no different than the evaluation of a party's reasonable conduct in most tort cases, including legal malpractice cases. Thus, the inquiry into the maintenance of procedures reasonably adapted to avoid legal errors is not so difficult as to produce an "absurd" result. Given the number of courts that have evaluated the reasonable procedures prong of the bona fide error defense, the workability of the standard has been proven. See *infra* at Part III, nn.21-23.

3. Finally, petitioner asserts that applying the reasonable procedures requirement to legal errors puts federal courts "in the awkward position of having to establish standards for the professional conduct of attorneys, an area traditionally left to the states." Pet. Merit Br. 27. Just the opposite is true. If legal errors are removed from the plain language of the bona fide error defense, Congress will have effectively imposed liability on lawyers to non-clients for exercising their professional judgment. *See* discussion *infra* at Part III.C.

II. A PLAIN READING OF THE BONA FIDE ERROR DEFENSE DOES NOT RENDER THE FDCPA'S SAFE HARBOR PROVISION INEFFECTIVE OR SUPERFLUOUS

Petitioner argues that the Sixth Circuit's decision in this case renders the bona fide error defense incompatible and/or superfluous with the safe harbor provision set forth in § 1692k(e). Petitioner broadly characterizes the safe harbor provision as a means for a debt collector to obtain clarification about the FDCPA's meaning and application, where "legal uncertainty puts debt collectors at risk for liability." Pet. Merit Br. 28. Petitioner's suggestion, however, that an advisory opinion is available for all situations involving "legal uncertainty" is overstated. On this point, petitioner acknowledges that the FTC's authority to render advisory opinions is limited to the requirements of the FDCPA.[13] Petitioner further concedes that when a debt collector is faced with uncertainty relative to state or other federal law impacting the FDCPA, the debt collector cannot seek an FTC advisory opinion.

1. Petitioner's broad characterization of the remedy provided by the safe harbor provision further ignores the FTC's internal requirements governing the issuance of advisory opinions. FTC Rules of Practice 1.1, 16 C.F.R. § 1.1(a), provides in relevant part:

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[13] *See* Pet. Merit Br. Part V.

> (a) Any person, partnership, or corporation may request advice from the Commission with respect to a course of action which the requesting party proposes to pursue. The Commission will consider such requests for advice and inform the requesting party of the Commission's views, *where practicable*, under the following circumstances:
>
> > (1) The matter involves a substantial or novel question of fact or law and *there is no clear Commission or court precedent*; or
> >
> > (2) The subject matter of the request and consequent publication of Commission advice is of significant public interest. (Emphasis added).

The "practicability" of obtaining an advisory opinion from the FTC is highly questionable, especially in situations where a lawyer is engaged to initiate litigation and a delay in obtaining an opinion could impact a statute of limitations or otherwise adversely compromise a client's rights. Obtaining an advisory opinion would be especially troublesome in situations such as foreclosures where time is of the essence and any delay in litigation could result in the value of collateral being substantially impaired.

This "practicability" is also impacted by the FTC's internal rule that there be "no clear Commission or court precedent." Given this requirement, it is understandable that the FTC would be reluctant to issue an advisory opinion when there is existing case

law. *See, e.g., Lewis v. ACB Bus. Servs., Inc.*, 135 F.3d 389, 399 (6th Cir. 1998) (observing that the federal courts have uniformly held that an FTC opinion is not binding precedent).[14] Further, courts have rejected FTC opinions that conflict with the plain language of the FDCPA.[15] *See, e.g., Dutton v. Wolpoff & Abramson*, 5 F.3d 649, 654 (3rd Cir. 1993); *Fox v. Citicorp Credit Servs., Inc.*, 15 F.3d 1507, 1513 (9th Cir. 1994); *Scott v. Jones*, 964 F.2d 314, 317 (4th Cir. 1992).

2. Next, the fact that advisory opinions are not binding on courts may create an irreconcilable conflict of interest between attorneys and their clients where a lawyer seeks the protection of the safe harbor provision despite the existence of court precedent favorable to a client's best interest. In such a situation, a conflict would necessarily arise if the advisory opinion turns out to be inconsistent with existing court precedent, as a lawyer would be placed in the impossible ethical dilemma of deciding whether to assert the favorable court precedent in the best interest of the client, or to act in a manner consistent with the advisory opinion in order to gain personal

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[14] *See also Pressley v. Capital Credit & Collection Serv., Inc.*, 760 F.2d 922, 925 (9th Cir. 1985); *Hawthorne v. Mac Adjustment, Inc.*, 140 F.3d 1367, 1372, n.2 (11th Cir. 1998); *Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322, 1327, n.8 (7th Cir. 1997).

[15] Further, this Court concluded in *Heintz v. Jenkins*, 514 U.S. 291, 295 (1995), that Congress did not intend to authorize the FTC to construe the FDCPA in a manner that falls outside the range of reasonable interpretations of the express language.

protection from civil liability under the safe harbor provision.[16]

3. Finally, petitioner's characterization of the alleged broad remedy available under the safe harbor provision ignores the undeniable complexity of the meaning and application of the FDCPA.[17] This legislation contains few definitions and is applied without the benefit of governing administrative rules and regulations.[18] As a result, the complexity of the FDCPA has lead to litigation on virtually every aspect of the Act. *See, e.g.,* 104 AM. JUR. 3D 1 PROOF OF FACTS (2009).

Recognizing this vast complexity, petitioner's suggestion that a debt collector err on the side of caution or seek a formal advisory opinion from the FTC every time an ambiguity arises to resolve a "legal uncertainty" is both impractical and cost prohibitive, especially when there is existing case law precedent. This position also contravenes a purpose of the FDCPA by failing to provide protection to ethical debt collectors.

Common sense dictates that the bona fide error and safe harbor defenses are not incompatible and superfluous, but rather can and should be construed

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[16] For further discussion of an attorney's ethical duties *see infra* at Part III.C.2.

[17] *See* U.S. Br. 17, referencing the FDCPA as a "complex statutory scheme."

[18] 15 U.S.C. § 1692*l*(d).

to work hand-in-hand.[19] While debt collectors can seek to insulate themselves from civil liability under the safe harbor provision when there is no existing precedent, the bona fide error defense provides an affirmative defense against civil liability for debt collectors not engaged in abusive debt collection practices. Good faith reliance on existing case law is not an abusive practice.

III. A PLAIN READING OF THE BONA FIDE ERROR DEFENSE TO INCLUDE LEGAL ERRORS IS CONSISTENT WITH THE PURPOSE OF THE FDCPA

A. The Bona Fide Error Defense Is Consistent With The Purpose Of The Statute To Balance The Rights Of Ethical Debt Collectors And Consumers

1. Notwithstanding the remedial purpose of the FDCPA, Congress was also sensitive to the rights of ethical debt collectors. Congress expressly acknowledged that there are two important purposes: (1) to eliminate abusive debt collection practices; while

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[19] The Senate Committee on Banking, Housing and Urban Affairs commented: "A debt collector has no liability, however, if he violates the act in any manner, including with regard to the Act's coverage, when such violation is unintentional and occurred despite procedures designed to avoid such violations. A debt collector *also* has no liability if he relied in good faith on an advisory opinion issued by the Federal Trade Commission." S. Rep. No. 95-382, at 5 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1700. (Emphasis added).

(2) not competitively disadvantaging ethical debt collectors. *See* 15 U.S.C. § 1692(e). The FTC recently acknowledged the necessary role that debt collectors fulfill:

> If consumers do not pay their debts, creditors will become less willing to lend money to consumers, or may increase the cost of borrowing money. Creditors typically use collectors to try to recover on debts to decrease the amount of their lost revenues. Debt collection thus helps keep credit available and its cost as low as possible.

FEDERAL TRADE COMMISSION, COLLECTING CONSUMER DEBTS: THE CHALLENGE OF CHANGE iii (2009).[20]

Petitioner argues that the proverbial apple cart will be upset if the bona fide error defense is applied as broadly as it is written. This argument begs the question. Petitioner assumes the premise she is trying to prove – that Congress intended for the goal of consumer protection to outweigh the interest of an ethical debt collector who relied on a legal error. Not only is her reasoning circular, but it ignores that Congress created the bona fide error to protect good faith, mistaken debt collectors. This defeats any argument that enforcing this defense somehow frustrates the purpose of the statute.

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[20] *Available at* http://www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf.

If Congress meant what it said – that ethical debt collectors warrant protection – it is petitioner who asks the Court to disrupt the balance struck in § 1692k(c). Petitioner does not even try to characterize respondents' conduct as abusive or harassing. Respondents' conduct was responsible, conservatively based on case law, and unquestionably ethical. In fact, respondents' conduct was consistent with the FTC's recent suggestion that Congress amend the FDCPA to require debt collectors to inform consumers in validation notices that, among other things, "if they send a timely written dispute or request for verification, the debt collector must suspend collection efforts until it has provided the verification in writing." FEDERAL TRADE COMMISSION, COLLECTING CONSUMER DEBTS: THE CHALLENGE OF CHANGE 27 (2009).

2. The bona fide error defense does not, as petitioner argues, undermine the statute's deterrent effect, nor will it create "a race to the bottom that will leave the field to collectors with the fewest scruples." Pet. Merit Br. 32. Petitioner's assertion that the Sixth Circuit's decision will embolden debt collector's to act unethically in a "race to the bottom," ignores the serious financial penalties contained in the FDCPA under the civil (both individual and class action) and administrative provisions. As the United States indicates, there are significant administrative penalties available under the statute (up to $16,000 a day) for a violation made with actual knowledge. *See* U.S. Br. 13-14. It is noteworthy that the bona fide

error defense has no application to an administrative violation.

Indeed, petitioner's fear that the floodgates will be opened to unscrupulous debt collectors has not materialized. Since the Sixth Circuit's decision in this case, respondents have found twenty-one cases where federal courts have considered the bona fide error defense as applied to legal errors. Seven courts denied the defense as a matter of law,[21] eleven found issues of fact,[22] and three granted

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[21] *See Edwards v. Niagara Credit Solutions, Inc.*, ___ F.3d ___, 2009 WL 3273300 (11th Cir. 2009); *Herkert v. MRC Receivables Corp.*, ___ F.Supp.2d ___, 2009 WL 2998557 (N.D. Ill. 2009); *Midland Funding LLC v. Brent*, ___ F.Supp.2d ___, 2009 WL 2437243 (N.D. Ohio 2009); *Drossin v. Nat'l Action Fin. Servs., Inc.*, 641 F.Supp.2d 1314 (S.D. Fla. 2009); *Ruth v. Triumph P'ships*, 577 F.3d 790 (7th Cir. 2009) (although the court did not specifically hold that mistak s of law are included in § 1692k(c), it stated that, even if they are, the debt collector nevertheless failed to establish the defense); *Seeger v. AFNI, Inc.*, 548 F.3d 1107 (7th Cir. 2008) (same); *Edwards v. Niagara Credit Solutions, Inc.*, 586 F.Supp.2d 1346 (N.D. Ga. 2008).

[22] *See Elder v. David J. Gold, P.C.*, No. 08CV733A, 2009 WL 2580320 (W.D.N.Y. 2009); *Campbell v. Hall*, 624 F.Supp.2d 991 (N.D. In. 2009); *N. Star Capital Acquisitions, LLC v. Krig*, 611 F.Supp.2d 1324 (M.D. Fla. 2009); *Basile v. Blatt, Hasenmiller, Leibsker & Moore LLC*, 632 F.Supp.2d 842 (N.D. Ill. 2009); *Brazier v. Law Offices of Mitchell N. Kay, P.C.*, No. 8:08-cv-156-t-17MAP, 2009 WL 764161 (M.D. Fla. 2009); *Gaisser v. Portfolio Recovery Assocs., LLC*, 593 F.Supp.2d 1297 (S.D. Fla. 2009); *Hartman v. Great Seneca Fin. Corp.*, 569 F.3d 606 (6th Cir. 2009); *Miller v. Javitch, Block & Rathbone*, 561 F.3d 588 (6th Cir. 2009); *Parkis v. Arrow Fin. Servs., LLS*, No. 07 C 410, 2008

(Continued on following page)

summary judgment for the debt collector.[23]

Further, any perceived "race to the bottom" is not being run by ethical debt collectors. As the Sixth Circuit has recognized, the FDCPA has given rise to a class of professional plaintiffs specializing in suing ethical debt collectors for trivial violations:

> Ironically, it appears that it is often the extremely sophisticated consumer who takes advantage of the civil liability scheme defined by [the FDCPA], not the individual who has been threatened or misled. The cottage industry that has emerged does not bring suits to remedy the "widespread and serious national problem" of abuse that the Senate observed in adopting the legislation, . . . nor to ferret out collection abuse. . . . Rather, the inescapable inference is that the judicially developed standards have enabled a class of professional plaintiffs. . . .
>
> It is interesting to contemplate the genesis of these suits. The hypothetical Mr. Least Sophisticated Consumer ("LSC") makes a $400 purchase. His debt remains unpaid and undisputed. He eventually receives a collection letter requesting payment of the debt

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WL 94798 (N.D. Ill. 2008); *Richburg v. Palisades Collection LLC*, 247 F.R.D. 457 (E.D. Pa. 2008); *Ramirez v. Palisades Collection LLC*, No. 07 C 3840, 2008 WL 2512679 (N.D. Ill. 2008).

[23] *See Castro v. Collecto, Inc.*, ___ F.Supp.2d ___, 2009 WL 3617557 (W.D. Tex. 2009); *Pescatrice v. Orovitz, P.A.*, 539 F.Supp.2d 1375 (S.D. Fla. 2008); *McCorriston v. L.W.T., Inc.*, 536 F.Supp.2d 1268 (M.D. Fla. 2008).

> which he rightfully owes. Mr. LSC, upon receiving a debt collection letter that contains some minute variation from the statute's requirements, immediately exclaims "This clearly runs afoul of the FDCPA!" and rather than simply pay what he owes – repairs to his lawyer's office to vindicate a perceived "wrong." "[T]here comes a point where this Court should not be ignorant as judges of what we know as men." *Watts v. State of Ind.*, 338 U.S. 49, 52, 69 S.Ct. 1347, 93 L.Ed. 1801 (1949).

See Miller v. Javitch, Block & Rathbone, 561 F.3d 588, 596 (6th Cir. 2009) (quoting *Miller v. Javitch, Block & Rathbone*, 534 F.Supp.2d 772, 778-779 (S.D. Ohio 2008) (noting that the plaintiff "fits the description of [the] hypothetical consumer to a tee, and we will not 'countenance lawsuits based on frivolous misinterpretations or nonsensical assertions of being led astray.'") (citation omitted)).

Congress recognized the potential for abuse of the FDCPA in § 1692k(a)(3), which permits a court to award attorney's fees against plaintiffs who bring claims in bad faith. Because the statute generally favors the consumer, it is more susceptible to abuse by consumers than debt collectors.

3. Contrary to petitioner's assertions, a plain reading of the bona fide error defense will not necessarily increase the scope of discovery or render private enforcement cost prohibitive. First, regardless of whether the bona fide error defense includes legal errors, a plaintiff has a right and an incentive to seek

discovery supporting a claim for additional damages – including the "frequency and persistence of the noncompliance, the nature of the noncompliance, and whether the noncompliance was intentional." 15 U.S.C. § 1692k(b). Thus, as a practical matter, the overlapping issues regarding a debt collector's bona fide legal error will not significantly expand the scope of discovery.

Second, similar to other consumer legislation, Congress has provided within the FDCPA that a successful plaintiff may be entitled to an award of attorney's fees. Petitioner's argument then that even the most "stalwart plaintiff and her attorneys" will be deterred is wrong. As the Sixth Circuit noted in *Miller*, the exact opposite has occurred, a cottage industry has arisen for the sole purpose of collecting attorney fees. *See* 561 F.3d at 596.

In short, petitioner has failed to show that the express purpose of the FDCPA will be undermined if the bona fide error defense is found to include legal errors. Petitioner's arguments in this respect are inconsistent with the clear and unambiguous language of the statute. Even if it is assumed that failing to remove legal mistakes from the plain language of the bona fide error defense somehow leads to harsh results, this Court has long recognized an "unwillingness to soften the import of Congress's chosen words even if [it is] believe[d] the words lead to a harsh outcome. . . . It results from 'deference to the supremacy of the Legislature, as well as recognition

that Congressmen typically vote on the language of a bill.'" *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004).

B. The Legislative History Reinforces The Conclusion That The Bona Fide Error Defense Includes Mistakes Of Law

The legislative history demonstrates that the plain language of the bona fide error defense includes legal errors. The Senate Report provides:

> A debt collector has no liability, however, if he violates the act *in any manner, including with regard to the act's coverage,* when such violation is unintentional and occurred despite procedures designed to avoid such violations.

S. Rep. No. 95-382, at 5 (1977) *reprinted in* 1977 U.S.C.C.A.N. 1695, 1700 (emphasis added).[24] The chief sponsor of the FDCPA, Senator Riegle, also confirmed that if a debt collector violates the FDCPA "by accident" and "didn't intend for the effect to be as it was," it could avoid liability by invoking the bona fide error defense. Senate Comm. on Banking, Housing & Urban Affairs, *Markup Session*: S. 1130 – Debt Collection Legislation 60 (July 26, 1977); *see*

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[24] Petitioner seeks to trivialize the importance of this statement by asserting that it is only a "single sentence in the report of one house of Congress." Pet. Merit Br. 37. Nonetheless, it is part of the legislative history and, to that extent, provides relevant insight into congressional intent.

also Johnson v. Riddle, 305 F.3d 1107, 1123 (10th Cir. 2002) ("We find no indication in the legislative history [of the FDCPA] that Congress intended this broad language to mean anything other than what it says.").

C. *Heintz v. Jenkins* Compels The Conclusion That The Bona Fide Error Defense Includes Legal Errors

In *Heintz v. Jenkins*, 514 U.S. 291 (1995), this Court concluded that the FDCPA applies to lawyers regularly engaged in debt collection litigation. *Id.* at 299. This Court, applying a plain text analysis, held that "[i]n ordinary English, a lawyer who regularly tries to obtain payment of consumer debts through legal proceedings is a lawyer who regularly 'attempts' to 'collect' those consumer debts." *Id.* at 294. This Court also reasoned that lawyer liability under the FDCPA does not constitute an "absurd" result because: (1) "the Act says explicitly that a 'debt collector' may not be held liable if he 'shows . . . that the violation was not intentional and resulted from a bona fide error . . . '"; and (2) there is no reason to believe that "the fact that a lawsuit turns out ultimately to be unsuccessful could, by itself, make the bringing of it an 'action that cannot be taken.'" *Id.* at 295-96. The Sixth Circuit's determination below is consistent with both the plain text analysis and

ultimate conclusion in *Heintz*.[25] Further, the result in both cases makes abundant sense given the potential liability faced by lawyers.

1. If legal errors are removed from the bona fide error defense, lawyers will face potential liability to non-clients for the exercise of their professional judgment.

A lawyer's potential liability under the FDCPA will generally be a consequence of claimed legal error. Thus, petitioner's proposal to restrict the bona fide error defense to exclude legal errors essentially removes the conduct of lawyers from the ambit of the bona fide error defense – providing them with no protection from liability for even the most unintentional and good faith errors in professional judgment. This is tantamount to congressional control of attorney advocacy under the FDCPA, subjecting even the most ethical attorneys to lawsuits by non-clients for exercising professional judgment.

Recently, the Ohio Supreme Court surveyed not only Ohio case law, but similar precedent from numerous states, and concluded that attorneys

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[25] Numerous courts have concluded that, based upon the Court's comments in *Heintz*, the bona fide error defense must apply to legal errors. *See, e.g., Johnson v. Riddle*, 305 F.3d 1107, 1123 (10th Cir. 2002).

should not be preoccupied, or even concerned with potential third party claims. The court reasoned:

> [A]n attorney's preoccupation or concern with potential negligence claims by third parties might diminish the quality of legal services provided to the client if the attorney were to weigh the client's interests against the possibility of third-party lawsuits.

Shoemaker v. Gindlesberger, 887 N.E.2d 1167, 1171 (Ohio 2008).

In the same vein, most states recognize a litigation privilege which generally shields an attorney from a third party claim arising from litigation activities. *See, e.g.*, CAL. CIV. CODE § 47(b); *see also* Joan Teshima, *Attorney's Liability To One Other Than Immediate Client, For Negligence In Connection With Legal Duties*, 61 A.L.R. 4th 618 (1988). Petitioner's attempt to remove the vast majority of attorney errors from the bona fide error defense would necessarily drive a wedge between debt collection lawyers and their clients. Likewise, a restrictive interpretation would subordinate the States' strong interest in regulating the legal profession to the federal courts' interpretation of a consumer protection statute.

2. If the bona fide error defense does not include legal errors, then clients' interests are subordinated to those of their attorneys and third parties.

Petitioner's suggestion that a lawyer must err on the side of caution ignores the fact that the interests of the attorney in avoiding liability cannot be paramount to the best interests of the client. An attorney owes his client an ethical duty of uncompromised and zealous representation. *See Johnson v. Riddle*, 296 F.Supp.2d 1283, 1290 (D. Utah 2003). This duty not only requires "the assertion of the client's best case,"[26] but also mandates that "[a] lawyer should pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer." OHIO RULES OF PROF'L CONDUCT R. 1.3, cmt. 1 (2010).[27] These principles of loyalty and independent judgment are fundamental to the attorney-client relationship. "Neither [a] lawyer's personal interest . . . nor the desires of third persons should be permitted to dilute the lawyer's loyalty to the client." *Id.* at 1.7, cmt. 1. The best interests of the client should be paramount to the attorney's interest in avoiding liability.

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[26] *Johnson*, 296 F.Supp.2d at 1291 (quoting Janet Flaccus, *Fair Debt Collection Practices Act: Lawyers and the Bona Fide Error Defense*, 2001 ARK. L. NOTES 95, 97 (2001)).

[27] Ohio's Rules of Professional Conduct are based on the American Bar Association's Model Rules of Professional Conduct. *See In re Perrin*, 361 B.R. 853, 857 n.3 (6th Cir. BAP 2007).

Petitioner's effort to exclude legal errors from the bona fide error defense creates a Hobson's choice for attorneys that would create an irreconcilable ethical conflict of interest, increase claims of legal malpractice, expose lawyers to third party claims inconsistent with the litigation privilege, and generally induce a second "round" of litigation under the FDCPA by any debtor who successfully defends the underlying case. These undesirable consequences will not be mitigated by any countervailing societal benefit.

IV. THE TRUTH IN LENDING ACT DOES NOT WARRANT SETTING ASIDE THE PLAIN MEANING OF THE FDCPA

A. Petitioner's Analogy To The Bona Fide Error Defense In TILA Is Flawed.

Petitioner argues that § 1692k(c) excludes legal errors because: (1) Congress "borrowed" the language from TILA's then current bona fide error defense when it enacted the FDCPA; and (2) Congress understood the allegedly "settled" interpretation of the pre-1980 TILA defense to exclude legal errors. Petitioner's argument is mistaken for several reasons.

1. A plain language analysis dispenses with the need for comparisons to predecessor statutes.

This Court has made clear that the starting point for determining congressional intent is the statutory text itself. *See Lamie v. U.S. Trustee*, 540 U.S. 526,

534 (2004). The sole function for the Court, if the language of the statute is plain and the disposition required by the text is not absurd, is to enforce the language of the statute according to its terms. *Id.* In *Lamie,* this Court declined to engage in the very method of statutory interpretation advocated by petitioner – a comparison with the language of a predecessor statute. *Id.* at 533. Nonetheless, petitioner's argument demands that this Court delve into the "pitfalls that plague too quick a turn to the more controversial realm of legislative history," as opposed to restricting its review to "the plain meaning since that approach respects the words of Congress." *Id.* at 536. This Court should reject this invitation because the plain language of § 1692k(c) alone determines its meaning.

2. Petitioner has not established Congress's intent to incorporate judicial interpretations of TILA's bona fide error defense into the FDCPA.

Petitioner posits that § 1692k(c) excludes legal errors because Congress adopted existing judicial interpretations of TILA's bona fide error defense. This position wrongly assumes that when Congress utilizes language from an existing statute in a new statute, there is a presumption that Congress intended to adopt existing judicial interpretations of that language. Rather, this Court has recognized several factors that must be considered in determining whether Congress intended to adopt existing

judicial interpretations. These factors include: (1) whether the judicial interpretations are settled; and (2) whether congressional intent has been expressed in the legislative history or stated purpose of the statute.

a. The judicial interpretation of TILA's bona fide error defense was unsettled.

Petitioner mistakenly relies upon this Court's decision in *Rowe v. N.H. Motor Transp. Ass'n*, 128 S.Ct. 989, 994 (2008), which held that: "when judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its judicial interpretations as well." In the instant case, unlike the statutory phrase that was analyzed in *Rowe,* the judicial interpretation of TILA's bona fide error defense was not settled when the FDCPA was enacted.

In *Rowe,* this Court found that Congress deliberately copied the pre-emption provision of the Airline Deregulation Act of 1978 ("ADA of 1978") when drafting the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), "[a]nd it did so fully aware of this Court's interpretation of that language as set forth in *Morales* [*v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992)]." *Id.* at 994; *see also Reina v. United States,* 364 U.S. 507, 510 (1960).

In this case, the language petitioner claims was lifted from the pre-1980 version of TILA and "inserted" into the FDCPA, however, was never reviewed by this

Court. Nor was there a consensus among the lower courts. Of the eleven circuit courts, only the Second and Seventh,[28] had found that § 1640(c) applied to clerical errors prior to the FDCPA's enactment. A district court from the Eleventh Circuit, however, found that § 1640(c) applied to legal errors. *See Welmaker v. W. T. Grant Co.*, 365 F.Supp. 531 (N.D. Ga. 1972). Numerous courts had also commented on the unsettled state of the law. *See, e.g., Lirtzman v. Speigel, Inc.*, 493 F.Supp. 1029, 1034 (N.D. Ill. 1980) (noting "some conflict regarding the type of bona fide error to which the statutory defense . . . is applicable. . . .").[29]

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[28] *See Ives v. W.T. Grant Co.*, 522 F.2d 749 (2nd Cir. 1975); *Haynes v. Logan Furniture Mart, Inc.*, 503 F.2d 1161 (7th Cir. 1974). Only after the FDCPA was enacted did the Fifth and Tenth Circuits find that § 1640(c) was restricted to clerical errors. *See McGowan v. King, Inc.*, 569 F.2d 845 (5th Cir. 1978); *Herrera v. First N. Sav. & Loan Ass'n*, 805 F.2d 896 (10th Cir. 1986). Petitioner claims the Fifth and Ninth Circuits had decided the issue prior to the FDCPA's enactment, citing *Palmer v. Wilson*, 502 F.2d 860 (9th Cir. 1974) and *Turner v. Firestone Tire & Rubber Co.*, 537 F.2d 1296 (5th Cir. 1976). Pet. Merit Br. 22. These cases, however, do not stand for this proposition. In *Palmer*, the court simply cites *Ratner v. Chem. Bank New York Trust Co.*, 329 F.Supp. 270 (S.D.N.Y. 1971) for the proposition that § 1640(c) applies to clerical errors only. *Palmer*, 502 F.2d at 861. There is no analysis as to whether the creditor relied upon the advice of counsel or whether the omitted credit terms were based on a legal error. *Id.* Similarly, the *Turner* case is devoid of any reference to a legal error. *Turner* was merely cited by subsequent courts for the proposition that § 1640(c) is "the so-called clerical error defense." *Turner*, 537 F.2d at 1298.

[29] *See also Forbes Credit Union v. Mewhinney*, 638 P.2d 383, 388 (Kan. Ct. App. 1982); *Hinkle v. Rock Springs Nat'l Bank*,

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Further, even those courts limiting § 1640(c) to clerical mistakes recognized the unsettled nature of the issue. *See Ives,* 522 F.2d at 757 (noting "[t]he 'unintentional violation' provision has been the subject of substantial litigation and two different analyses have emerged."); *see also Herrera,* 805 F.2d at 900 (finding that Congress resolved the unsettled status of the law when it amended § 1640(c) in 1980 to specifically exclude errors of legal judgment as to the requirements of the Act.). Thus, unlike the statutory provision analyzed in *Rowe*, the case law interpreting § 1640(c) was unsettled when the FDCPA was enacted in 1977.

b. Congress did not express an intent in the FDCPA's legislative history to adopt any particular judicial interpretation of TILA's bona fide error defense.

In *Rowe*, this Court concluded, based on legislative history, that when Congress "borrowed language" from the pre-emption provision in the ADA, Congress expressly referenced this Court's prior interpretation in *Morales. See Rowe,* 128 S.Ct. at 994-95 (citing H.R. Conf. Rep., at 83-85, U.S. Code Cong. & Admin. News 1994, pp. 1676, 1755; *see also Lorillard v. Pons,* 434 U.S. 575, 582 (1978) (citing 113 Cong.Rec. 31254 (1967)).

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538 F.2d 295, 297 (10th Cir. 1976); *Hernandez v. O'Neal Motors, Inc.*, 480 F.Supp. 491, 497 (D.N.M. 1979).

Plainly, when Congress intends to adopt judicial interpretations it knows how to express that intent. In *Bragdon v. Abbott,* 524 U.S. 624 (1998), the Court observed that Congress defined "disability" in the Americans with Disabilities Act of 1990 ("ADA of 1990") by using the same language contained in the Rehabilitation Act, and stated that "nothing in this chapter shall be construed to apply a lesser standard than the standards applied under . . . the Rehabilitation Act. . . ." *Id.* at 631-32. The *Bragdon* Court also found Congress adopted the judicial interpretation of "disability" in the legislative history of the ADA of 1990. *Id.* at 645 (citing H.R.Rep. No. 101-485, pt. 2, p. 52 (1990)).

When enacting the FDCPA, Congress did not indicate in the legislative history that the bona fide error defense should be construed consistent with the Second and Seventh Circuits' interpretations of TILA. In fact, the legislative histories of TILA and the FDCPA are significantly different. The legislative history of TILA reflects Congress's inclusion of the bona fide error defense in response to complaints from creditors that clerical errors would be inevitable due to the complexity of mathematical computations. *See e.g., Ratner v. Chem. Bank New York Trust Co.,* 329 F.Supp. 270 (S.D.N.Y. 1971) (citing Hearings on S. 5 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency, 90th Cong., 1st Sess. 64 ff., 226, 374, 426-427, 529, 584, 698 (1967)).

Conversely, the legislative history of the FDCPA shows that Congress granted more expansive protection, stating that "[a] debt collector has no liability

. . . if he violates the act *in any manner, including with regard to the act's coverage,* when such violation is unintentional and occurred despite procedures designed to avoid such violations." *See Johnson,* 305 F.3d at 1123 (citing S. Rep. No. 95-382 at p. 5) ("We find no indication in the legislative history [of the FDCPA] that Congress intended this broad language to mean anything other than what it says."). The fact that Congress chose not to amend the FDCPA to exclude legal errors – despite having amended the statute several times – defeats any attempt to draw parallels between the defenses now.

Contrary to petitioner's assertion, if Congress had intended to restrict the FDCPA's bona fide error defense to clerical errors it could have done so in 1977 by: (1) incorporating § 1640(c) as it did in the Consumer Leasing Act of 1976; or (2) expressing its intent to adopt § 1640(c) as it did in the Expedited Funds Availability Act of 1987 ("EFAA").[30] The legislative history of the FDCPA does not evidence a congressional intent to adopt TILA's bona fide error defense or the judicial interpretations of the Second and Seventh Circuit Courts.

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[30] Congress expressly adopted the language of § 1640(c) in the EFAA. *See* S. Rep. No. 100-19, at 6 (1987), *reprinted in* 1987 U.S.C.C.A.N. 489, 560 ("The penalties and exceptions to them are drawn from the Truth in Lending Act.").

c. The express purpose of the FDCPA demonstrates that Congress did not adopt TILA's bona fide error defense.

This Court has been keenly aware that congressional adoption of judicial interpretation is only appropriate when analyzing statutes with the same or similar objectives. *Rowe,* 128 S.Ct. at 995-996. In *Rowe*, the Court found that the similarities in the legislative purposes of the FAAAA and ADA of 1978 could not have been more apparent, as both preemption provisions were intended to promote reliance on competitive market forces. *Id.*

In stark contrast, the purposes of TILA and the FDCPA are fundamentally different. The express purpose of TILA is exclusively to protect consumers through "a meaningful disclosure of credit terms." *See* 15 U.S.C. § 1601. The FDCPA, on the other hand, was drafted to balance the purposes of: (1) eliminating abusive debt collecting practices; while (2) not competitively disadvantaging nonabusive debt collectors. *See* 15 U.S.C. § 1692(e). These differing legislative purposes between the FDCPA and TILA support the inclusion of legal errors within the FDCPA's bona fide error defense.

d. TILA provides creditors with several avenues to avoid liability for legal errors.

Even though TILA did not address concerns of "competitively disadvantaging" creditors, Congress

provided creditors with several methods to avoid liability for violations. First, under TILA, a consumer must prove both that a mistake was material and that it was detrimentally relied upon to recover damages. *See Turner v. Beneficial Corp.*, 242 F.3d 1023, 1027-28 (11th Cir. 2001). Second, with certain limitations, creditors are given sixty days to correct errors. *See* 15 U.S.C. § 1640(b). Third, the Federal Reserve Board is required to issue model forms which, if relied upon by a creditor, provide a defense to liability. *See* 15 U.S.C. § 1604(b). Fourth, TILA provides an advisory opinion procedure. *See* 15 U.S.C. § 1640(f).

Thus, unlike TILA, if legal mistakes are removed from the plain language of the FDCPA's bona fide error defense, ethical debt collectors will be left with only the safe harbor defense which, as already demonstrated, is often impracticable or unavailable. As such, to give effect to the FDCPA's express purposes of balancing the interests of both consumers and ethical debt collectors, legal errors cannot be removed from the plain language of the bona fide error defense.

B. The 1980 TILA Amendments Do Not Support A Restrictive Interpretation Of The FDCPA's Bona Fide Error Defense.

Congress amended TILA to provide that legal errors concerning the Act's coverage were not protected. The FDCPA was not so amended despite Congress having the opportunity to do so on

numerous occasions. Petitioner's assertion that the 1980 amendments to TILA demonstrate a congressional intent to exclude legal errors from the FDCPA's bona fide error defense presumes that "[i]n all likelihood, the issue *never occurred* to Congress. . . ." Pet. Merit Br. 43-44 (emphasis added). Congress's failure to amend § 1692k(c) since 1980, however, leads to the opposite conclusion.

In 1986, Congress amended the FDCPA to repeal the exemption for attorneys. *See* Pub. L. No. 99-361 (1986). In 1995, this Court highlighted the "clerical versus legal error" debate in *Heintz,* when it held that lawyers are liable under the FDCPA as debt collectors. *See Heintz,* 514 U.S. at 299. Since *Heintz,* the vast majority of circuit and district courts have determined that § 1692k(c) is not limited to clerical errors.[31] Nevertheless, Congress has remained silent on this issue.[32]

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[31] *See, e.g., Jenkins,* 124 F.3d at 832; *Johnson,* 305 F.3d at 1122-24; *Neilsen,* 307 F.3d 623; *Rosado v. Taylor,* 324 F.Supp.2d 917, 931-33 (N.D. Ind. 2004); *Edwards v. Niagara Credit Solutions, Inc.,* ___ F.3d ___, 2009 WL 3273300 (11th Cir. 2009).

[32] In all, Congress has amended the FDCPA on eight occasions since its enactment in 1977. *See* Pub. L. No. 98-442 (1984); Pub. L. No. 99-361 (1986); Pub. L. No. 101-73 (1989); Pub. L. No. 102-242 (1991); Pub. L. No. 102-550 (1992); Pub. L. No. 104-88 (1995); Pub. L. No. 104-208 (1996); Pub. L. No. 109-351 (2006). Congress specifically addressed lawyers and litigation in 2006 when it clarified that a legal pleading is not an "initial communication." There is also a proposed amendment to the FDCPA for 2009 which makes no provision for amending the

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It is well recognized that the silence of Congress, when it has authority to speak, gives rise to an inference as to legislative purpose. For example, this Court has held that the failure of Congress to express disapproval of a judicial interpretation by amendment bolsters the construction of the statute. *See Elec. Storage Battery Co. v. Shimadzu,* 307 U.S. 5, 14 (1939).[33] Additionally, it is recognized that when Congress has had abundant opportunity to give further expression of its will, the failure to do so amounts to legislative approval and ratification of the construction given the statutes by the courts. *See Missouri v. Ross,* 299 U.S. 72, 75 (1936); *see also Francis v. Southern Pac. Co.,* 333 U.S. 445, 450 (1948). These principles of statutory construction are especially applicable where, as in this case, the statute has undergone amendments. *See e.g., Kukman v. Baum,* 346 F.Supp. 55, 64 (N.D. Ill. 1972).

Thus, petitioner's assertion that Congress forgot to amend the FDCPA is unpersuasive. The fact that Congress did not amend the bona fide error defense in the FDCPA to exclude legal mistakes on eight

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language of § 1692k(c). *See* H.R. 3126, 111th Cong., 1st Sess. (2009).

[33] *See also Reynolds v. Comm'r of Internal Revenue,* 114 F.2d 804, 811 (4th Cir. 1940) ("when a statute has been amended from time to time and language which has been construed by the courts is retained, it must be assumed that Congress is satisfied with and has adopted the construction given by the courts."); *Wolfe v. E.F. Hutton & Co., Inc.,* 800 F.2d 1032, 1038 (11th Cir. 1986).

occasions since the 1980 TILA amendments signifies its ratification and approval of the construction placed upon § 1692k(c) by a growing majority of courts.

C. The Ninth Circuit's Decision In *Baker* Is Based On A Flawed Analysis[34]

Only two circuits have held that the FDCPA's bona fide error defense does not apply to legal errors. *See Baker v. G. C. Servs. Corp.*, 677 F.2d 775 (9th Cir. 1982); *Hulshizer v. Global Credit Servs., Inc.*, 728 F.2d 1037 (8th Cir. 1984). Both based their decisions on a flawed analogy between TILA and the FDCPA. In *Baker*, the Ninth Circuit erroneously relied on *Ratner v. Chem. Bank New York Trust Co.*, 329 F.Supp. 270, 281 (S.D.N.Y. 1971).

The *Ratner* court was asked to review whether a creditor's failure to disclose a mandated nominal annual percentage rate could be excused based on a mistake of law. *Ratner,* 329 F.Supp. at 272. In determining that TILA's bona fide error defense did not apply to legal mistakes, *Ratner* examined the "sparse" legislative history. *Id.* at 282. As discussed above, the legislative history reflected a concern with a lender's potential liability for purely mathematical and clerical errors. *Id.*

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[34] Although petitioner does not cite *Baker* in her Merit Brief, she principally relied upon *Baker* in her Petition for a Writ of Certiorari.

Baker also relied on the Seventh Circuit's decision in *Haynes* that limited TILA's bona fide error defense to clerical errors. *See Haynes v. Logan Furniture Mart, Inc.*, 503 F.2d 1161 (7th Cir. 1974). Significantly, since *Haynes*, the Seventh Circuit has declined to extend this holding to the FDCPA's bona fide error defense. *See Jenkins*, 124 F.3d 824; *Nielsen*, 307 F.3d 623, 641 (noting that "nothing in the language of the FDCPA bona fide error provision limits the reach of the defense to clerical errors and other mistakes not involving the exercise of legal judgment."); *Seeger v. AFNI*, 548 F.3d 1107, 1114 (7th Cir. 2008); *Ruth v. Triumph P'ships*, 577 F.3d 790 (7th Cir. 2009).

Baker's unwarranted reliance on cases interpreting TILA is no match for the plain meaning of the FDCPA. Further, the 1980 TILA amendments do not support finding a congressional intent to exclude legal error from the FDCPA defense. Rather, the TILA amendments demonstrate that Congress knows how to express an intent to exclude legal errors from a bona fide error defense, and has chosen not to do so with the FDCPA.

V. THE BONA FIDE ERROR DEFENSE APPLIES TO ALL LEGAL ERRORS.

In her final argument, petitioner contends that the bona fide error defense excludes all legal errors, including mistakes relating to construction of other state and federal laws impacting the FDCPA. Petitioner concedes, however, that there are fundamental

inconsistencies with her arguments. Pet. Merit Br. 47-48.

First, petitioner admits that because the FTC has no authority to render advisory opinions interpreting other state and federal laws, the FDCPA's safe harbor and bona fide error defenses are not superfluous. Second, petitioner concedes "to the extent that the Court looks to the amended version of TILA to construe the meaning of the FDCPA, that statute provides only that its bona fide error defense does not include errors regarding a 'person's' obligations under this subchapter." Pet. Merit Br. 48 (quoting 15 U.S.C. § 1640(c)). Given these concessions petitioner's reliance on TILA becomes even more tenuous.

Petitioner's remaining argument for excluding legal errors from the FDCPA defense in connection with other state and federal laws is, yet again, that "ignorance of the law is no defense." As previously established, however, this criminal law maxim has no bearing on the FDCPA's bona fide error defense because ignorance can never be a basis for asserting the defense.

Petitioner also overlooks problems caused by excluding legal errors from the bona fide error defense in the context of construing other state and federal laws, as highlighted in *Watkins v. Peterson Enterp., Inc.*, 57 F.Supp.2d 1102 (E.D. Wash. 1999); *see also Frye v. Bowman, Heintz, Boscia, & Vician, P.C.*, 193 F.Supp.2d 1070 (S.D. Ind. 2002). In *Watkins*, the plaintiff alleged that the defendant violated the

FDCPA by using pay orders instead of obtaining judgments. *Watkins*, 193 F.Supp.2d at 1106. A pay order is an order from a state judge directing a debtor's employer to pay a sum of money to the court. *Id.* at 1105. In response, the defendant, in asserting the bona fide error defense, presented evidence that it only used the pay orders because it was required to do so by the State courts. *Id.* at 1107.

Watkins recognized that the debt collector was placed between the proverbial rock and hard place in trying to determine the proper course of action. The debt collector had one of two choices: (1) to either comply with state law by relying on an "official interpretation" of a State statute and violate the FDCPA; or (2) to violate State law in order to comply with the FDCPA. Given this quandary, *Watkins* correctly determined that the plain language of the FDCPA defense necessarily includes legal errors. *Id.*; *see also Frye,* 193 F.Supp.2d at 1085-90.

CONCLUSION

The text, structure, purpose and history of the FDCPA all dictate that the statute's bona fide error defense includes legal errors. The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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REPLY BRIEF

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KAREN L. JERMAN,

Petitioner,

v.

CARLISLE, MCNELLIE, RINI, KRAMER & ULRICH LPA
AND
ADRIENNE S. FOSTER,

Respondents.

On a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

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ARGUMENT

Respondents do not contest that they intentionally engaged in conduct that violated the FDCPA. Their sole defense is that they did not know that their conduct was proscribed by the Act. Neither respondents nor any of their nine amici has identified a single other federal statute that provides a complete defense to civil liability for such a misunderstanding of the law. They nonetheless insist that Congress intended the FDCPA to break new ground and create an apparently unprecedented defense for the debt collection industry. However, nothing in the language, history, or purposes of the statute supports that conclusion.

Contrary to respondents' principal textual contention, a defendant's ignorance of the law does not render its "violation" of a statute "not intentional." Indeed, this Court has repeatedly declined to view the parallel statutory phrase "knowing violation" as referring to a defendant's knowledge of the law or to create a mistake of law defense. And reaching a contrary conclusion here would render the Act's safe harbor defense superfluous, applicable only when the bona fide error defense already provided immunity from liability.

Giving the Act a conventional reading does not create any special unfairness to debt collectors. Federal law pervasively holds regulated businesses responsible for complying with the law, even when the law's requirements are not entirely clear. That defendants are sometimes held liable for reasonable, good faith mistakes of law is simply a consequence of

a legal system that generally declines to make ignorance of the law a defense.

Nor can there can be any argument that Congress intended to create a unique mistake of law defense to avoid creating a conflict of interests between attorney debt collectors and their clients – when the bona fide error defense was drafted, the statute specifically excluded attorneys from its coverage. And, in any event, it is well settled that an attorney's obligation of zealous advocacy is always subordinated to his duty to obey the law.

I. The Language of the FDCPA Does Not Signal An Intent To Depart From The Established Presumption That Mistakes Of Law Are No Defense.

While Congress sometimes limits criminal liability (or certain harsh civil sanctions, like civil penalties and punitive damages) to cases in which the defendant knew his conduct was unlawful, *see* Petr. Br. 15, it rarely makes the defendant's reasonable misunderstanding of the law a complete defense to civil liability. In fact, neither respondents nor any of their amici has been able to identify any other statute that does so.[1] There is no basis for

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[1] One of respondents' amici suggests that an analog can be found in the judge-made doctrine of qualified immunity. NARCA Br. 13-15. Respondents themselves call the analogy "specious," Resp. Br. 26 n.10, and as petitioner explained in her opening brief, the comparison is inapt for a number of reasons, including most prominently because the defense was estabished to protect the exercise of governmental discretion and, for that reason, neither this Court nor Congress has ever extended it to

believing that Congress intended the FDCPA to create an unusual (perhaps unprecedented) defense for debt collectors.

A. Respondents' Interpretation Is Inconsistent With The General Presumption That Ignorance Of The Law Is No Defense To Civil Or Criminal Liability.

1. Respondents do not dispute the general principle that courts should avoid construing statutes to allow ignorance of the law as a defense. Instead, they argue that the principle has no application here because their defense is based on a reasonable mistake of law, not ignorance of the law's existence. *See* Resp. Br. 25-26.

But from its earliest days, the presumption that ignorance of the law is no defense has applied to misunderstandings of a known law. *See* Edwin R. Keedy, *Ignorance and Mistake in the Criminal Law*, 22 HARV. L. REV. 75, 76 (1908). Accordingly, this

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a private party, *see* Petr. Br. 16-17. Amicus nonetheless argues that debt collectors are similarly situated to government officials because both need protection from "over enforcement" of legal limitations on their behavior. *See* NARCA Br. 13. But if Congress had shared that belief, it presumably would not have authorized private actions for violations of "*any* provision of this subchapter," 15 U.S.C. § 1692k(a), including those amicus finds trivial. Instead, Congress provided other mechanisms to protect against over-enforcement. *See infra* § III.B. Amicus fails to cite any statute in which Congress has gone further and responded to an alleged risk of "over enforcement" by providing a mistake of law defense to civil liability for non-governmental defendants.

Court has employed the phrases "ignorance of the law" and "mistake of law" interchangeably. *See, e.g.*, *Cheek v. United States*, 498 U.S. 192, 199 (1991) ("The general rule that ignorance of the law *or a mistake of law* is no defense to criminal prosecution is deeply rooted in the American legal system.") (emphasis added). And the Court has applied the presumption when a defendant claimed a reasonable misunderstanding of law. *See, e.g.*, *Armour Packing Co. v. United States*, 209 U.S. 56, 85 (1908) (invoking presumption to deny defense where the "petitioner believed itself to be within its legal rights . . . and that the statute had no application to a shipment of goods for exportation in the manner shown in this case"); *Harriman v. N. Sec. Co.*, 197 U.S. 244, 298 (1905) ("With knowledge of the facts and of the statute, the parties turned out to be mistaken in supposing that the statute would not be held applicable to the facts. Neither can plead ignorance of the law as against the other . . . ."); *Barlow v. United States*, 32 U.S. 404, 411 (1883) (applying rule where the "only mistake, if there has been any, is a mistake of law" because the defendant asserted he believed that his imports constituted "refined sugars" within the meaning of an import duty statute).[2]

The traditional rationales for the presumption apply whether the defendant is ignorant of the law's

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[2] Nor is the presumption limited to criminal cases. *Contra* Resp. Br. 25-26. *See, e.g.*, *Barlow*, 32 U.S. at 411 ("It is a common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either *civilly or criminally*." (emphasis added).

existence or mistaken about its requirements. "Based on the notion that the law is definite and knowable, the common law presumed that every person knew the law." *Cheek*, 498 U.S. at 199. The presumption arises from "the extreme difficulty of ascertaining what is, *bona fide*, the interpretation of the party; and the extreme danger of allowing such excuses to be set up for illegal acts, to the detriment of the public." *Barlow*, 32 U.S. at 411. That risk arises no less when defendants claim they were aware of, but misunderstood, the law.

2. Respondents nonetheless argue that it is "absurd[]" to suggest that Congress intended to hold debt collectors civilly liable for reasonable, good faith mistakes of law. Resp. Br. 26. As this case illustrates, they say, the requirements of the FDCPA are not always clear and unless defendants have a mistake of law defense, they may be held liable even when there is some legal authority for their position or a disagreement among the courts. Resp. Br. 26-27.[3]

All of that is true. But it is also unexceptional in a legal system that generally declines to make mistake of law a defense to civil liability. Many other regulated industries could make the same arguments and complaints about numerous other federal statutes that impose extensive, sometimes

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[3] As respondents note, Resp. Br. 4 n.3, petitioner wrongly stated in her opening brief that the Ninth Circuit's decision in *Camacho v. Bridgeport Fin. Inc.*, 430 F.3d 1078 (9th Cir. 2005), was the only "on-point" appellate decision regarding the lawfulness of an "in writing" requirement in a validation notice.

ambiguous, restrictions on their business practices, provide a civil private right of action, and afford defendants no mistake of law defense. For example, federal antitrust laws are complex, and their requirements are not always certain. *See, e.g., Nash v. United States*, 229 U.S. 373, 376-77 (1913). Nonetheless, Congress has long provided a private right of action for treble damages, but no mistake of law defense. *See* 15 U.S.C. § 15. The same is true of many other statutes as well. *See, e.g.*, Fair Labor Standards Act, 29 U.S.C. § 216(b) (providing private right of action for double damages against "any employer who violates" the statute's minimum wage or overtime provisions, with no mistake of law defense); Copyright Act, 17 U.S.C. § 504(b) (authorizing actual damages for any violation); Family Medical Leave Act, 29 U.S.C. § 2617 (double damages and lost wages); Truth in Lending Act, 15 U.S.C. § 1640 (actual and statutory damages).

Likewise, in resolving circuit splits, this Court routinely decides cases in which a losing defendant can honestly claim that it acted on the basis of a reasonable misunderstanding of the law (adopted by at least one federal circuit), yet almost never declines to apply its decision to the pending case or otherwise protects the defendant from civil (and sometimes criminal) liability despite the good faith misunderstanding. *See, e.g., Wyeth v. Levine*, 129 S.Ct. 1187 (2009) (upholding a $6 million verdict against a defendant who erroneously but in good faith believed that receiving FDA approval for product labeling would be a complete defense against state tort claims); *New York Times Co. v. Tasini*, 533 U.S. 483 (2001) (finding a cause of action under the

Copyright Act against defendants who in good faith believed they were lawfully entitled to include previously licensed works in an electronic database, thus exposing the defendants to what later became an $18 million liability); *Bates v. United States*, 522 U.S. 23 (1997) (resolving circuit split by holding that specific intent to injure or defraud is not an element of 20 U.S.C. § 1097(a), and applying result to pending criminal case).

The question in this case, thus, is whether Congress intended to provide debt collectors a special exception to the general rule that regulated entities are strictly liable for their legal mistakes. As discussed next, there is no sufficient reason to believe that it did.

B. The Language Of The Bona Fide Error Defense Does Not Demonstrate That Congress Intended To Provide Debt Collectors An Unprecedented Mistake Of Law Defense.

Respondents argue that a "plain text analysis of the bona fide error defense" shows that "it applies to all types of error," including mistakes of law. Resp. Br. 7. To the contrary, the plain text, read in light of common legal usage and its history, confirm that Congress did not intend to create an unusual mistake of law defense.

1. *The Court Is Not Compelled To Give The Statutory Language The Broadest Reading Possible Simply Because The Language Standing Alone Would Bear That Construction.*

1. Respondents' principal textual argument is that the statute's reference to a "violation" that "was not intentional" can – and therefore must – be read to encompass cases in which the defendant intended to engage in the conduct that violates the Act, but mistakenly believed his actions were lawful. They make much of the fact that Congress did not simply use the word "intentional" in the bona fide error defense, but paired it with the word "violation." An intentional *violation*, they argue, necessarily implies knowledge of unlawfulness even if the word "intentional" standing alone would not. Resp. Br. 14-17.

But the same could be said of the statutory phrase "knowing violation." In common usage, to say that a defendant *knowingly violated* a statute could well be understood to mean that the defendant had knowledge of his actions and of the law. Nonetheless, this Court has repeatedly refused to give federal statutes that construction. For example, in *Bryan v. United States*, 524 U.S. 184 (1998), this Court construed a statute that punished anyone who "knowingly violates" certain provisions of a federal firearm statute. *Id.* at 192 (construing, among other provisions, 18 U.S.C. § 924(a)(1)(B)). Under respondents' plain language argument, the use of the word "violates" should have compelled this Court to find that the statute applied only if the defendant knew that he was violating the act. But this Court

concluded otherwise. "[T]he knowledge requisite to a *knowing violation* of a statute," the Court held, "is factual knowledge as distinguished from knowledge of the law." *Id.* (emphasis added). That conclusion was no aberration. *See Babbitt v. Sweet Home Chapter of Cmties. for a Greater Or.*, 515 U.S. 687, 696 n.9 (1995) (stating that Congress's reference to a "knowing[]" violation of the Endangered Species Act was not meant to create a "specific intent" crime); *United States v. Int'l Minerals & Chem. Co.*, 402 U.S. 558, 563 (1971) (declining to attribute to Congress "the inaccurate view that the Act requires proof of knowledge of the law, as well as the facts, and that it intended to endorse that interpretation by retaining the word 'knowingly'"); *cf. also Reynolds v. United States*, 98 U.S. 145, 167 (1878) ("Every *act* necessary to constitute the crime was knowingly done, and the crime was therefore *knowingly committed*") (emphasis added).[4]

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[4] Respondents assert that this Court's decision in *Safeco Insurance Company of America v. Burr*, 551 U.S. 47 (2007), "is in direct contradiction to petitioner's argument that a 'knowingly violation' only requires 'factual knowledge as distinguished from knowledge of the law." Resp. Br. 29 (quoting Petr. Br. 18). The language quoted from petitioner's brief – which respondents say is contradicted by *Safeco* – is a direct quotation from this Court's opinion in *Bryan*. *See* Petr. Br. 18 (quoting *Bryan*, 524 U.S. at 192). As explained in petitioner's opening brief, *Safeco* is entirely consistent with cases like *Bryan* because the Court construed the word "knowing" in the context of a paragraph that applied only to "willful" violations. *See* 551 U.S. at 59. Respondent point to no similar special statutory context here. Moreover, even if "knowingly" sometimes encompassed a defendant's knowledge of the law, that would not

These decisions are irreconcilable with respondents' insistence that phrases like "knowing violation" can only be read to encompass a defendants' intent or knowledge with respect to the lawfulness of his actions. Likewise, they demonstrate that pairing a mens rea term like "knowingly" with the word "violation" is not enough, standing alone, to overcome the presumption against construing acts of Congress as establishing a mistake of law defense. *See Int'l Minerals*, 402 U.S. at 563 (rejecting conclusion that Congress's initial enactment, and subsequent retention, of the phrase "knowingly violates" was intended to abandon "the general rule that ignorance of the law is no excuse").

Of course, the FDCPA speaks of an *intentional*, rather than a *knowing*, violation. But respondents offer no reason why, as a matter of plain language, the word *intentional* when paired with *violation* would more clearly refer to the defendant's knowledge of the law. In fact, respondents have not identified any case construing the phrase "intentional violation" in any other statute to refer to a defendant's intention to violate a known legal duty.

2. Respondents point out that Congress could have more clearly conveyed its intent to *avoid* creating a mistake of law defense by referring to the "act constituting the violation." Resp. Br. 15; *see also* Resp. Br. 18 (noting that in the safe harbor provision, Congress referred to an "act or omission" rather than

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help respondents here, as nothing in *Safeco* suggests that the word "intentional" has the same meaning.

a "violation").[5] The same could have been said of the federal firearms statute this Court construed in *Bryan*, for example – Congress could have provided that "whoever . . . knowingly [*engages in an act that*] violates [certain subsections] of section 922 . . . shall be fined under this title, imprisoned not more than five years, or both." *Bryan*, 524 U.S. at 188 n.6 (quoting 18 U.S.C. § 924(a)(1)). But given the strong presumption against construing statutes as creating mistake of law defenses, the question is not whether Congress clearly excluded a mistake of law defense; it is whether Congress unmistakably created one.

Congress could have clearly expressed an intent to create a defense for legal errors in any number of ways. *See* Petr. Br. 24-25. It could have, for example, expanded the safe harbor defense to encompass acts "done or omitted in good faith in conformity with any advisory opinion of the Commission [*or any court*]." 15 U.S.C. § 1692k(e). The fact that it expressly limited the defense to acts done in good faith reliance on Commission opinions suggests that Congress did not intend to create a nearly identical protection encompassing reliance on judicial decisions through significantly less explicit language elsewhere.

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[5] The wording of the safe harbor defense was likely intended to avoid the awkwardness of referring to a "*violation* done in good faith conformity with any advisory opinion of the Commission," given that the point of the provision is to make clear that such actions are *not* violations of the Act. 15 U.S.C. § 1692k(e).

2. The Language Of The Defense Must Be Read In Light Of Common Legal Usage.

Congress also could have conveyed its intent to excuse mistakes of law by extending the bona fide error defense to those whose "violation was not [*willful*]." *See* Petr. Br. 20. That Congress chose, instead, to use the word "intentional" strongly suggests that it intended no mistake of law defense.

Words like "intentional," "knowing," and "willful" are terms of art, which Congress presumably intends courts to interpret in light of their traditional legal meanings. *See, e.g.*, *Safeco*, 551 U.S. at 57-58. And of the words Congress typically uses to define states of mind, it is "willful," not "intentional," that most strongly connotes knowledge of unlawfulness. Petr. Br. 20-23.

To be sure, the word "willful" may have different shades of meaning depending on context. *See* Resp. Br. 28-29. Sometimes it refers to a defendant's actual knowledge of unlawfulness, and sometimes reckless disregard for the law will suffice.[6] That variation does not diminish petitioner's point that among the words describing mental states, "willful" is the word Congress usually uses to describe the state of mind respondents' ascribe to the bona fide error defense. By contrast, as far as petitioner has been able to discern, and respondents and its amici have shown,

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[6] *See Safeco*, 551 U.S. at 57 n.9. When used in some unusually complex criminal statutes, it may even require proof that the defendant is aware of the particular legal provision he is charged with violating. *See, e.g.*, *Cheek*, 498 U.S. at 192.

Congress has never before used the word "intentional" to create a mistake of law defense.

3. *The History The Bona Fide Error Provision's Language Confirms That The Defense Does Not Extend To Legal Errors.*

The language of the bona fide error defense must also be construed in its historical context. *See Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 755-58 (1979); Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947) ("[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.").

The language of the FDCPA's bona fide error defense is identical to the language of Section 1640(c) of the Truth in Lending Act (TILA) as it stood at the time of the FDCPA's passage. Pet. Br. 21. As petitioner has explained, the text and structure of the TILA provision made clear that it provided no mistake of law defense. *See* Petr. Br. 21-23. Moreover, respondents do not dispute that at the time the FDCPA was enacted, every federal court of appeals to have considered the question had held that the provision did not excuse mistakes of law. *See* Resp. Br. 51; Petr. Br. 22.

Respondents argue instead that the consensus among the circuits was narrower than petitioner recounts because the Fifth and Ninth Circuits had simply held that the defense was limited to "clerical errors," without directly ruling that mistakes of law did not qualify as clerical errors. Resp. Br. 51 n.28. But that much was obvious, and subsequent cases

had no difficulty understanding those decisions as precluding a mistake of law defense. *See, e.g.*, *Baker v. G. C. Servs. Corp.*, 677 F.2d 775, 779 (9th Cir. 1982) (relying on *Palmer v. Wilson*, 502 F.2d 860, 861 (9th Cir. 1974)); *McGowan v. King, Inc.*, 569 F.2d 845, 850-51 (5th Cir. 1978) (relying on *Turner v. Firestone Tire & Rubber Co.*, 537 F.2d 1296 (5th Cir. 1976)).

Respondents nonetheless point to other cases that, they say, recognized the "unsettled state of the law." Resp. Br. 51. But those cases identify, in total, three district court decisions from within the Fifth Circuit, and one early state supreme court opinion.[7] By the time Congress enacted the FDCPA, however, the district court decisions had been abrogated by Fifth Circuit precedent holding that the defense applied only to "clerical errors." *See Turner*, 537 F.2d at 1298. Moreover, the Louisiana Supreme Court decision – which was decided without the benefit of the later federal court of appeals' analysis and contained none of its own – did not address whether a mistake as to the meaning of the TILA fell within the bona fide error defense. Instead, it refused to find that a defendant's mistake of *state law* "amounts to

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[7] *Rolader v. Ga. Power Co.*, 4 CCH Consumer Credit Guide P 98,684 (N.D. Ga. 1974); *Thrift Funds of Baton Rouge, Inc. v. Jones*, 274 So.2d 150, 161 (La. 1973); *Welmaker v. W. T. Grant Co.*, 365 F. Supp. 531, 544 (N.D. Ga. 1972); *Richardson v. Time Premium Co.*, CCH Consumer Credit Guide P 99,272 (S.D. Fla. 1971).

an intentional violation of the [TILA] disclosure requirements." *Thrift Funds*, 274 So.2d at 161.[8]

Consequently, there is every reason to believe that at the time of the FDCPA's passage, Congress would have viewed the language of Section 1640(c) as having a settled judicial construction that precluded a bona fide error defense premised solely on the defendant's misunderstanding of the federal statute. And there is likewise every reason to presume that it intended that understanding to apply to the FDCPA as well.[9] *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 385-86 & n.21 (1983).

C. The 1980 Amendment To The TILA Did Not Change The Meaning Of The FDCPA's Bona Fide Error Defense.

Respondents also point out that in 1980, Congress amended the TILA's bona fide error defense to explicitly provide that "an error of legal judgment with respect to a person's obligations under [the TILA] is not a bona fide error," 15 U.S.C. § 1640(c), but did not make a comparable amendment to the

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[8] The Court need not decide in this case whether violations of the FDCPA arising from mistakes of state law fall within the Act's bona fide error defense. *See* Petr. Br. 47.

[9] It does not matter that this Court had not passed on the question or that Congress did not specifically mention the lower court consensus in the legislative history. *See, e.g., Bragdon v. Abbott*, 524 U.S. 624, 644-45 (1998) (applying presumption in absence of any Supreme Court decision); *Merrill Lynch v. Dabit*, 547 U.S. 71, 85 (2006) (citing no legislative history, but concluding that "Congress can hardly have been unaware" of the judicial and administrative consensus).

FDCPA. The inference, respondents argue, is that Congress intended to exclude a mistake of law defense under the TILA, but not the FDCPA. *See* Resp. Br. 56-59. But as petitioner has explained, *see* Petr. Br. 40-46, that argument fails for a number of reasons.

Most prominently, it wrongly assumes that the 1980 amendment was intended to change, rather than codify or clarify, the defense's original meaning. But not every amendment changes a statute's substance. *See, e.g., Bates v. United States*, 522 U.S. 23, 32 (1997). And in this case, it is obvious that the 1980 Amendment was clarifying, rather than revising, in at least some respects. Most of the proviso it added to the end of Section 1640(c) gives examples of what the defense *does* cover: "clerical, calculation, computer malfunction and programming, and printing errors." 15 U.S.C. § 1640(c). But there is no reason to think that these kinds of errors were not covered by the original statute, or that they are not covered by the FDCPA now just because they are expressly mentioned in the TILA but not the FDCPA.

The question, then, is whether the express exclusion of legal errors should be viewed any differently. Nothing in the text of the amendment suggests that Congress switched gears halfway through the proviso to stop codifying and start modifying. Nor have respondents pointed to anything in the legislative history to support that conclusion. *See* Petr. Br. 41-43. Moreover, respondents' interpretation requires concluding that as originally enacted, the TILA's language was intended to encompass a mistake of law defense, which for all the reasons already discussed would

require an unconventional reading of the statutory language and would run against the long-standing assumption that Congress does not intend to create such defense without making that intention clear.

II. The Structure Of The Statute Is Incompatible With Respondents' Interpretation Of The Bona Fide Error Defense.

Respondents' interpretation of the FDCPA is also incompatible with other provisions of the statute and its structure as a whole.

A. Respondents' Interpretation Renders The Safe Harbor Defense Superfluous.

Under respondents' interpretation, satisfying the elements of the safe harbor provision will, in every instance, also satisfy the elements of the bona fide error defense, rendering the safe harbor provision superfluous. Petr. Br. 28-30. In particular, by acting "in good faith in conformity with any advisory opinion of the Commission," 15 U.S.C. § 1692k(e), the defendant will have demonstrated that any violation was not intentional (because the defendant honestly believed that in following the advisory opinion he was complying with the law),[10] that the error was bona fide (*i.e.*, in "good faith," *id.*), and that he had in place procedures reasonably adapted to avoid any such

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[10] If the defendant did not believe that the advisory opinion was correct, his actions would not be in "good faith" and therefore would not qualify for a defense under the safe harbor provision. *See* 15 U.S.C. § 1692k(e).

error (namely, acting in conformity with Commission opinion). *See id.* § 1692k(c); *see also Ruth v. Triumph P'ships*, 577 F.3d 790, 804 (7th Cir. 2009) (holding that reliance on advisory opinion would satisfy requirements for any mistake of law defense under the bona fide error provision).

Consequently, under respondents' interpretation, the safe harbor defense is left with no independent work to do, having been eclipsed by a bona fide error defense that protects defendants' reliance not only on advisory opinions, but also judicial decisions, advice of counsel, or the debt collector's own independent legal research.

Respondents do not refute this reasoning, or identify any instance in which a defendant would be entitled to the safe harbor defense but not the bona fide error defense if the Court accepts their interpretation. Instead, respondents argue that in a number of respects, the advisory opinion process is not always available, or particularly useful, to debt collectors. *See* Resp. Br. 32-36. But that misses the point of petitioner's surplusage argument, which turns the superfluity of the *safe harbor defense* not on the usefulness of the *advisory opinion process*. Regardless of how useful (or useless) the advisory opinion process has become in practice, there is simply no reason to think that Congress would create a safe harbor defense if it intended to afford the same protection under a different provision (particularly if it intended, as respondents argue, to allow a bona fide error defense even if the defendant acted *in conflict* with an advisory opinion, *see* Resp. Br. 34-35).

B. Respondents' Complaints About The Advisory Opinion Process Do Not Demonstrate That Congress Intended The Bona Fide Error Defense To Supplant The Safe Harbor Defense.

Respondents' interpretation would also substantially reduce any incentive for debt collectors to seek the Commission's opinion on uncertain questions under the FDCPA. *See, e.g.*, Resp. Br. 32-36 (explaining why debt collectors would prefer to rely on a bona fide error defense rather than seeking advisory opinions); DRI Br. 11-18 (same).

Respondents and their amici counter that the Commission itself has eliminated any incentive to seek advisory opinions by refusing to issue them in most cases. But the Commission's inadequate implementation of its advisory opinion authority tells us little about how Congress intended the Act to operate when it enacted the statute. And in the end, it is simply implausible to suggest that Congress created an advisory opinion process to address ambiguities in the FDCPA, and provided a safe harbor defense for acting in compliance with those opinions, but nonetheless intended to create a mistake of law defense to address the same problem in a way that eliminates any incentive for debt collectors to ask for, or follow, the Commission's advice. The Commission's failure to offer that advice as freely as it should is cause to criticize the Commission, not reason to judicially revise the statute to compensate for that failure.

Moreover, respondents' complaints about the advisory opinion process must be kept in perspective.

Most federal statutes do not provide regulated parties a means of requesting legal advice from the Government, or a defense from liability if they follow that advice. Accordingly, the fact that the FDCPA's advisory opinion process may not completely shield debt collectors from the risk of liability from legal error – or that it has turned out to be rather unhelpful as implemented – does not mean that Congress must, therefore, have intended to provide debt collectors a more comprehensive defense elsewhere.

C. Respondents' Structural Arguments Are Unconvincing.

Respondents offer two structural arguments of their own, but neither is persuasive.

First, respondents claim that petitioner's reading renders the "bona fide error" defense unavailable for a number of violations for which intentional conduct is an element. *See* Resp. Br. 19-22 (giving example of Section 1692d(5), which prohibits repeatedly calling a debtor "with intent to annoy, abuse, or harass"). But there is no reason to assume that Congress intended the defense to be available with respect to every type of violation. It may well be, for example, that under petitioner's construction, the bona fide error defense provides no shelter to a debt collector who "use[s] . . . violence or other criminal means to harm the physical person of a debtor." 15 U.S.C. § 1692d(1). But that is hardly troublesome. Moreover, it seems unlikely that someone who uses violence as a means of debt collection would qualify under respondents' view of the bona fide error defense, either – believing that the Act permitted breaking kneecaps as a

method of debt collection would not, presumably, count as a "bona fide" error. But that then demonstrates that respondents' purported anomaly arises even under their own interpretation.

Second, respondents suggest that petitioner's understanding of the word "intentional" in the bona fide error defense is inconsistent with the word's use in Section 1692k(b). Resp. Br. 22-24. That provision directs the court to take into account "the extent to which such noncompliance was unintentional" when setting the amount of any statutory damages. 15 U.S.C. § 1692k(b). Because proving a violation sometimes will establish that the defendant intended to commit the act that violates the statute, respondents argue, the "debt collector's intent to commit the 'act' constituting a violation of the statute cannot logically be viewed as a factor justifying the assessment of additional damages under § 1692k(b)." Resp. Br. 24.

This argument is unconvincing because respondents' construction of "intentional" has the same effect. In many cases, prior to assessing damages, a court will have already rejected the defendant's bona fide error defense because the defendant failed to show that the violation was "not intentional" as respondents construe the term (*i.e.*, because the defendant intended to commit the act and knew his conduct was unlawful). Yet despite having already found the violation intentional, the court will be called upon to set statutory damages in consideration of, among other things, "the extent to which the noncompliance was intentional." 15 U.S.C. § 1692k(b). To the extent this result is awkward, the

difficulty arises from the way the statute was written and not from petitioner's construction of its terms.

III. Respondents' Policy Arguments Do Not Overcome The Clear Import Of The Statute's Text And Structure.

Respondents are also wrong in arguing that the underlying purposes of the statute cannot be served without recognition of a mistake of law defense.

A. Attorneys' Obligations To Their Clients Do Not Entitle Them To Mistake Of Law Immunity.

Respondents and their amici argue at length that Congress must have intended to allow a mistake of law defense for attorney debt collectors because otherwise they will be put in an untenable position, faced with the obligation to zealously advocate for their clients on the one hand, and the desire to avoid personal liability on the other. This argument – which echoes those rejected by the Court in *Heintz v. Jenkins*, 514 U.S. 291 (1995) – fails for a number of reasons.

First, Congress could not have crafted the "bona fide error" defense with these concerns in mind because at the time the defense was created, the statute expressly exempted attorneys. *See* Pub. L. No. 95-109, § 803(6)(F), 91 Stat. 874 (1977) (providing that the term "debt collector" did not include "any attorney-at-law collecting a debt as an attorney on behalf of and in the name of a client"). As enacted, the attorney exemption, not the bona fide error defense, was the solution to the alleged problems of applying the Act's requirements to attorneys.

Of course, with time and experience, Congress concluded that attorney debt collectors were not entitled to special treatment and withdrew the exemption in 1986. *See* Pub. L. No. 99-361, 100 Stat. 768 (1986). At the time, opponents argued that extending the Act to attorneys "would create practical problems for attorneys collecting debts as attorneys-at-law." H.R. Rep. No. 99-405, at 11 (1985) (dissenting views of Rep. Hiler). Proponents disagreed, but they did not seek to reassure their colleagues by asserting that the bona fide error defense would shield attorneys from liability for reasonable mistakes of law. Nor did Congress respond to the concern raised on lawyers' behalves by altering the bona fide error defense in any way. *See Heintz*, 514 U.S. at 295 (noting that "when Congress later repealed the attorney exemption, it did not revisit the wording of these substantive provisions").

Second, respondents' insistence that no responsible legislature could have contemplated exposing attorneys to liability without providing them a mistake of law defense is undermined by the fact that many states have enacted FDCPA equivalents applicable to attorneys without providing a mistake of law defense.[11]

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[11] Some state statutes with no exemption for attorney debt collectors do not provide any bona fide error defense at all. *See, e.g.*, Mass. Gen. Laws Ann. ch. 93, § 49; Md. Code Ann., Com. Law § 14-203; Or. Rev. Stat. § 646.641; Wis. Stat. Ann. § 427.105. Other state statutes do contain a bona fide error defense. *See, e.g.*, Ark. Code Ann. § 17-24-512(c); Fla. Stat. Ann. § 559.77(3); Me. Rev. Stat. Ann. tit. 32, § 11054(3); N.H. Rev. Stat. Ann. § 358-C:4(II)(b). But the amici States have informed

Third, the professional duties of lawyers – who above all others are most reasonably expected to know and obey the law – do not justify special claims to immunity for their legal errors. "[A]n attorney's ethical duty to advance the interests of his client is limited by an equally solemn duty to comply with the law and standards of professional conduct." *Nix v. Whiteside*, 475 U.S. 157, 164 (1986). Indeed, the Model Rules of Professional Conduct themselves place limitations on the means lawyers may use in the pursuit of their client's interests.[12] When the boundary between permissible and impermissible measures is unclear, attorneys may have to balance their desire to avoid personal liability (for bar or criminal sanctions, or civil liability to third parties injured by their illegal conduct) with their obligation to zealously promote their client's interests within the bounds of the law. *See id.* at 168 n.5 (noting that ethics rules recognize "the difficult choices that may confront an attorney who is sensitive to his

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this Court that they "are aware of no decisions interpreting a parallel state bona fide error provision to immunize a defendant's mistake of law." States Br. 11.

[12] *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.4 (requiring no obstruction or falsification); Rule 4.1 (prohibiting lawyers from making materially false statement to third parties, or failing to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client); Rule 4.4(a) ("In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person . . . .").

concurrent duties to his client and to the legal system").[13]

But that dilemma is not limited to lawyers – other professionals, including non-lawyer debt collectors, have ethical obligations to their clients, too. And the tension between a professional duty to one's client and an obligation to obey the law is hardly unique to the FDCPA.. For example, attorney debt-collectors have long been subject to civil or even criminal liability at state law for some abusive collection practices.[14] And although not as common, it is not unprecedented for Congress subject attorneys to liability for unlawful conduct undertaken during the representation of a client.[15]

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[13] In fact, attorneys and their clients' interests often will be closely aligned because in some cases clients may be held vicariously liable for their attorneys' violations of the FDCPA. *See* Br. Com. Law League of Am. 11-12 (collecting cases).

[14] *See, e.g.*, Br. OCAA 8 n.12 (discussing tort remedies); Ohio Rev. Code Ann. § 2917.21 (criminalizing telephone harassment); *id.* § 2917.11 ("No person shall recklessly cause inconvenience, annoyance, or alarm to another by . . . threatening harm to persons or property" or "communicating unwarranted and grossly abusive language to any person . . . ."); 47 U.S.C. § 223 (providing fines and possible imprisonment for a variety of telephone crimes, including making a phone call "without disclosing [one's] identity and with intent to annoy, abuse, threaten, or harass any person at the called number or who receives the communications").

[15] For example, attorneys may be liable to third parties under Section 10(b) the Securities Exchange Act, 15 U.S.C. § 78j(b). *See, e.g., Central Bank of Denver, N.A. v. First Interstate Bank of Denver*, 511 U.S. 164, 191 (1994); *Rubin v.*

Respondents have identified no common law doctrine or provision of state or federal law allowing attorneys a special mistake of law defense under generally applicable statutes that apply to their professional conduct.

Fourth, the extent to which the FDCPA governs a lawyer's uniquely representative duties is unsettled. Here, respondents were held liable for failing to make proper disclosures in a validation notice, not for anything they did in a courtroom or by advising a client. To the extent *other* applications of the Act might impose an intolerable interference with client relationships or the practice of law, there is no reason to believe that Congress intended to respond to that particular problem (which arises for only a small subset of debt collectors) by enacting a sweeping mistake of law defense that would apply to *any* mistake of law (even those having no effect on client representation) by *any* debt collector (including non-lawyers). It is far more likely that Congress intended courts to consider carefully claims that an attorney's conduct in representing a client violated the Act. *Cf. Heintz*, 514 U.S. at 296 ("[W]e do not see how the fact that a lawsuit turns out ultimately to be unsuccessful could, by itself, make the bringing of it an 'action that cannot legally be taken.'").[16]

Schottenstein, Zox & Dunn, 143 F.3d 263 (6th Cir. 1998) (holding attorney liable for omissions and misrepresentations to non-client).

[16] *See also* Com. Law League of Am. 16-17 (noting ongoing litigation in the lower courts over the availability of other limits on the Act's application to litigation conduct, including witness

B. Congress's Desire To Protect Law-Abiding Debt Collectors From Competitive Disadvantage Did Not Lead It To Create A Mistake Of Law Defense.

Respondents further argue that a mistake of law defense is consistent with Congress's desire "to insure that those debt collectors who refrain from abusive debt collection practices are not competitively disadvantaged . . . ." Resp. Br. 13 (quoting 15 U.S.C. § 1692(e)). This purpose, respondents insist, led Congress to protect not only those debt collectors who actually comply with the law, but also those who violate it, so long as their violation was not "abusive." And, the argument continues, a violation is not "abusive" unless the defendant knew he was violating the Act.

Respondents ignore that Congress defined in the text of the statute the practices it deemed sufficiently abusive to warrant prohibition and subjected debt collectors to liability for violating *any* of the statute's prohibitions, not simply those that a court might consider "abusive." *See* 15 U.S.C. §§ 1692b-1692k (defining unlawful practices); *id.* 1692k(a) (providing that "any debt collector who fails to comply with *any provision of this subchapter* with respect to any person is liable to such person . . . .") (emphasis added). Moreover, the civil liability provisions are not intended solely to punish culpable behavior, but also to provide compensation to those injured by

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immunity, litigation immunity, and the *Noerr-Pennington* doctrine).

unlawful acts, as well as a financial incentive for debt collectors to inform themselves of the law's requirements and bring themselves into compliance with the statute's commands. Those purposes are served by imposing liability even when a defendant acts on the basis of a good faith misunderstanding of the law.

Respondents' interpretation, on the other hand, effectively prevents liability whenever there are any reasonable grounds for disputing the law's meaning, a common situation according to respondents. *See* Resp. Br. 35 (stating that "the complexity of the FDCPA has led to litigation on virtually every aspect of the Act"). In the absence of binding on-point authority, debt collectors would be immune from liability for engaging in conduct that a broad majority of courts has held illegal, so long as some court, somewhere, has held a practice lawful. And so long as the practice is perceived to be effective, debt collectors will have an incentive to follow the least restrictive view of their obligations under the Act, knowing that even if they are sued, and their view of the law rejected, they will have absolute immunity from any liability. At the same time, those debt collectors who take the correct view of a disputable question of law, and constrain their activities accordingly, will suffer a competitive disadvantage vis-à-vis their law-breaking (but immunized) competitors.

Respondents nonetheless insist that the real risk to honest debt collectors comes not from their

competitors, but from debtors and their lawyers "suing ethical debt collectors for trivial violations." Resp. Br. 40.[17] But the potential for meritless or trivial litigation is not unique to this statute. It arises whenever Congress creates a private right of action and encourages citizens to act as private attorneys general by authorizing statutory damages and attorneys fees for prevailing parties. .In this case, Congress addressed that common risk with conventional protections. It authorized courts to award attorneys' fees and costs against plaintiffs who bring suit in bad faith. 15 U.S.C. § 1692k(a)(3). And it limited the incentive to pursue meritorious, but trivial, claims by allowing courts discretion to set the amount of statutory damages (the only damages likely available for truly trivial violations), in light of a variety of factors including "the nature of such

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[17] There is no basis to suggest that the litigation in this case meets that description. Although respondents attempt to minimize the violation here, the Act's requirements for validation notices form a core prophylactic against the kinds of serious harms the Act was designed to prevent. Moreover, refusing to accept oral debt disputes has significant consequences for consumers. Although the statute provides additional rights for those who dispute debts in writing, 15 U.S.C. § 1692g(b), it also provides important rights to those who dispute debts orally. *See Camacho*, 430 F.3d at 1081-82. Among other things, the statute protects a debtor's credit rating by prohibiting the debt collector from "communicat[ing] to any person credit information which is known or which should be known to be false, including [by] fail[ing] to communicate that a disputed debt is disputed," 15 U.S.C. § 1692e(8), whether the dispute is written or oral. *See Camacho*, 430 F.3d at 1082.

noncompliance" and, in class actions, "the number of persons adversely affected." *Id.* § 1692k(b). There is no reason to think that Congress went further and established a unprecedented mistake of law defense for debt collectors.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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AMICUS CURIAE BRIEF

(5)

No. 08-1200

In the Supreme Court of the United States

KAREN L. JERMAN, PETITIONER

v.

CARLISLE, MCNELLIE, RINI, KRAMER & ULRICH LPA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Section 813(c) of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. 1692k(c), provides that a debt collector may not be held liable in a private civil action for any violation that "was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." The question presented in this case is as follows:

Whether the affirmative defense provided by 15 U.S.C. 1692k(c) applies to a violation of the FDCPA that results from a debt collector's incorrect interpretation of the statute.

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In the Supreme Court of the United States

No. 08-1200

KAREN L. JERMAN, PETITIONER

v.

CARLISLE, MCNELLIE, RINI, KRAMER & ULRICH LPA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case concerns the interpretation of an affirmative defense to liability under the Fair Debt Collection Practices Act (FDCPA or Act), 15 U.S.C. 1692 *et seq.* The Federal Trade Commission (FTC) and other federal agencies enforce the Act administratively. 15 U.S.C. 1692*l*(a)-(b). Private civil actions under Section 813 of the FDCPA, 15 U.S.C. 1692k, supplement those administrative enforcement efforts. The FTC also has the exclusive authority to render advisory opinions that shield debt collectors who comply with them from civil liability under Section 1692k. The United States therefore has a substantial interest in the correct interpretation of the civil-liability provision.

STATEMENT

1. The FDCPA is one of a series of consumer-protection statutes enacted by Congress beginning in 1968 and collectively entitled the Consumer Credit Protection Act (CCPA), 15 U.S.C. 1601 *et seq.* The FDCPA was enacted in 1977 and is Title VIII of the larger statute.

The FDCPA prohibits debt collectors from engaging in harassing, deceptive, or unfair practices. 15 U.S.C. 1692d-1692f. It also requires debt collectors, within five days after first communicating with an individual debtor about a debt, to provide the debtor with a validation notice containing specific disclosures about what debt is being collected and how the debtor may dispute it. 15 U.S.C. 1692g. The Act regulates interactions between professional debt collectors and individual debtors; it does not apply to commercial debts or to creditors who collect their own debts.

Compliance with the FDCPA is enforced both by private civil actions and by federal agencies, chiefly the FTC. 15 U.S.C. 1692k, 1692*l*. Section 813 of the Act, the civil-action provision, generally provides for strict liability: "[A]ny debt collector who fails to comply with any provision of [the FDCPA] with respect to any person is liable to such person." 15 U.S.C. 1692k(a).[1]

The FDCPA establishes two exceptions to strict civil liability. First, any debt collector who acts "in good

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[1] Some of the FDCPA's substantive provisions state that a violation of the Act occurs only if the debt collector knows certain information or acts with a particular intent. See, *e.g.*, 15 U.S.C. 1692d(5) (prohibiting "[c]ausing a telephone to ring * * * with intent to annoy, abuse, or harass"); 15 U.S.C. 1692c(a)(3) (prohibiting contact in the workplace when the debt collector "knows or has reason to know" that the employer forbids it). In most circumstances, however, a violation is established entirely by the debt collector's conduct.

faith in conformity with" an advisory opinion issued by the FTC is not subject to civil liability. 15 U.S.C. 1692k(e). The second exception to civil liability is the affirmative defense at issue in this case: a debt collector is not liable in a private civil action if it "shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." 15 U.S.C. 1692k(c).

A prevailing plaintiff in an FDCPA suit is entitled to recover actual damages and attorney's fees. 15 U.S.C. 1692k(a)(1) and (3). The court may also award "additional damages" subject to statutory caps. In an individual action, those "additional damages" are limited to $1000; in a class action, they may not exceed $500,000 or 1% of the defendant's net worth, whichever is less. 15 U.S.C. 1692k(a)(2). In deciding whether to award additional damages, the district court considers "the extent to which the debt collector's noncompliance was intentional," "the nature of such noncompliance," and several other factors. 15 U.S.C. 1692k(b).

The FDCPA's administrative-enforcement scheme authorizes additional penalties for knowing violations of the Act. With certain exceptions,[2] violations of the

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[2] Although the FTC is the primary enforcer of the FDCPA, other specialized Federal agencies, such as the Federal Reserve Board of Governors, are empowered to enforce the Act, as well as other consumer-protection statutes, against financial institutions, surface and air carriers, and livestock packers and stockyards. 15 U.S.C. 1692*l*(b); accord, *e.g.*, Federal Trade Commission Act § 5(a)(2), 15 U.S.C. 45(a)(2) (identical division of authority); Truth in Lending Act § 108(a), 15 U.S.C. 1607(a) (similar). In practice, because the FDCPA does not cover a creditor's own efforts to collect debts owed directly to that creditor, see 15 U.S.C. 1692a(6), these other agencies are rarely if ever called upon

FDCPA are treated for administrative purposes as violations of the Federal Trade Commission Act (FTC Act), 15 U.S.C. 41 *et seq.* See 15 U.S.C. 1692*l*(a). The FTC generally responds to such violations either by entering cease-and-desist orders or by seeking injunctive relief in court. See FTC Act §§ 5(b), 13(b), 15 U.S.C. 45(b), 53(b). But when the violator has acted with "actual knowledge or knowledge fairly implied on the basis of objective circumstances" that its action was "prohibited by [the FDCPA]," it is subject to civil penalties of up to $16,000 per day. See FTC Act § 5(m)(1)(A) and (C), 15 U.S.C. 45(m)(1)(A) and (C); 74 Fed. Reg. 858 (2009) (to be codified at 16 C.F.R. 1.98(d) and (e)).[3]

2. In April 2006, respondent Carlisle, McNellie, Rini, Kramer & Ulrich LPA, a law firm, and respondent Adrienne S. Foster, an associate in that firm, filed a foreclosure lawsuit against petitioner on behalf of her home mortgage lender. Pet. App. 2a, 19a-20a. Respondents treated the complaint as an "initial communication with a consumer" triggering the FDCPA's notice requirements, 15 U.S.C. 1692g, and they attached to the complaint the form "Notice Under the Fair Debt Collection Practices Act" that they routinely use in foreclosure actions. Pet. App. 20a; see Joint Answer to Am. Compl. ¶ 19.[4] When petitioner disputed the debt, respondents

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to enforce the FDCPA. See FTC, *Annual Report 2009: Fair Debt Collection Practices Act* 1 n.2 (2009).

[3] The "bona fide error" defense at issue here has been held not to apply to civil-penalty actions brought by the government. *United States* v. *First Fed. Credit Control, Inc.*, No. C79-2274, 1982 U.S. Dist. LEXIS 17964, at *18-*19 (N.D. Ohio Mar. 11, 1982).

[4] Later that year, Congress amended the FDCPA to specify that a pleading in a civil action is not such an "initial communication," but that amendment applies only prospectively. See Pet. App. 26a-27a;

checked with their client and discovered that petitioner had paid her mortgage in full. Pet. App. 3a. Respondents then withdrew the foreclosure lawsuit. *Ibid.*

Petitioner subsequently filed this putative class action in federal district court, alleging that respondents had violated the FDCPA by providing her and the other class members with an inaccurate and misleading form validation notice. The notice to petitioner stated that the debt would be presumed valid unless petitioner disputed the debt "in writing" within 30 days. Petitioner contended that the FDCPA does not require a person in her position to provide *written* notice that she disputes a debt.

3. Based on the FDCPA's "bona fide error" defense, the district court granted summary judgment for respondents. Pet. App. 19a-41a.[5] The court noted that both parties agreed that respondents' alleged "bona fide error" was a mistake of law, *id.* at 31a & n.1, and that the courts of appeals were divided over whether a mistake of law could qualify for the defense, *id.* at 31a-32a. The court agreed with respondents that a mistake of law could qualify. *Id.* at 34a.

The district court further concluded that respondents had established the elements of the "bona fide error" defense on the facts of this case. The court held that respondents' inclusion of a written-dispute requirement in their notice reflected a "bona fide error" be-

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Financial Services Regulatory Relief Act of 2006, Pub. L. No. 109-351, § 802(a), 120 Stat. 2006 (15 U.S.C. 1692g(d)).

[5] Respondents initially contended that they had not violated the FDCPA at all and that, even before Congress amended the FDCPA (see note 4, *supra*), the service of a judicial complaint did not trigger the FDCPA's notice requirements. The district court rejected both contentions. Br. in Opp. App. 3-11; Pet. App. 24a-30a.

cause the circuits were divided as to the propriety of such a requirement and the Sixth Circuit had not addressed the issue. See Pet. App. 37a-39a. In considering the requirement that the defendant maintain "procedures reasonably adapted to avoid any such error," 15 U.S.C. 1692k(c), the court stated that "no procedure could have le[d] [respondents] to know that this Court would find an FDCPA violation in the validation notice sent to [petitioner]." Pet. App. 39a.

4. The court of appeals affirmed. Pet. App. 1a-18a.

a. In holding that the "bona fide error" defense under Section 1692k(c) encompasses errors of law, the court of appeals relied primarily on the Tenth Circuit's decision in *Johnson* v. *Riddle*, 305 F.3d 1107 (2002). Pet. App. 8a-11a. Petitioner had argued that the "maintenance of procedures reasonably adapted to avoid any such error," an element of the affirmative defense, could not sensibly be applied to errors of law. *Id.* at 12a. While acknowledging that it is "'more common to speak of procedures adapted to avoid clerical errors,'" the court concluded that "procedures * * * to avoid mistakes of law" do exist, such as "frequent education and review of the FDCPA law." *Id.* at 13a (quoting *Johnson*, 305 F.3d at 1123).

Petitioner had also argued that the FDCPA's "bona fide error" defense was borrowed from the Truth in Lending Act (TILA), 15 U.S.C. 1601 *et seq.* At the time of the FDCPA's enactment, TILA contained an identically worded affirmative defense, see 15 U.S.C. 1640(c) (1976), that had been construed not to cover legal errors. Pet. App. 13a. The court of appeals rejected the argument that the FDCPA should be identically construed, principally on the ground that, several years after the FDCPA's enactment, Congress had amended TILA, but

not the FDCPA, to exclude legal errors expressly. See *id.* at 13a-14a. The court also relied in part on a statement in the legislative history of the FDCPA that "a debt collector has no liability . . . if he violates the act in *any* manner . . . when such violation is unintentional and occurred despite procedures designed to avoid such violations." *Id.* at 14a (quoting S. Rep. No. 382, 95th Cong., 1st Sess. 5 (1977) (*Senate Report*)) (emphasis added by court of appeals).

Finally, the court of appeals found its interpretation to be supported by this Court's decision in *Heintz* v. *Jenkins*, 514 U.S. 291 (1995), which held that attorneys acting as debt collectors are covered by the FDCPA. Noting the existence of the Act's "bona fide error" defense, the Court in *Heintz* observed that not every unsuccessful debt-collection lawsuit would subject the creditor's attorney to FDCPA liability. See *id.* at 295. The court of appeals stated that "[t]his reasoning at least suggests that the defense is available for mistakes of law." Pet. App. 11a (quoting *Johnson*, 305 F.3d at 1123).

b. The court of appeals further held that respondents had successfully established the "bona fide error" defense. The court concluded that respondents had maintained procedures reasonably adapted to avoid any legal error by taking a variety of steps to maintain general expertise regarding the FDCPA. Pet. App. 15a-16a, 17a-18a. The court also concluded that "considerable time, effort and research were spent in evaluating the validity of the 'in writing' requirement." *Id.* at 17a.[6]

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[6] The "procedures" element of the defense was the only element on which petitioner contended that a factual dispute precluded summary judgment for respondents. The court of appeals observed, however, that it had previously construed the "unintentional violation" element to require only that "[t]he debt collector * * * show that the violation

SUMMARY OF ARGUMENT

A. A mistake of law does not fit the settled meaning of the statutory phrase "not intentional." In the context of statutes like the FDCPA, an act is "intentional" if the actor means to do it. Here, respondents intentionally added the written-dispute language to their validation notice, and they intentionally sent that notice to petitioner—whether or not they understood the law. Had Congress wanted to make the FDCPA one of the exceptional statutes in which reasonable ignorance of the law is a valid defense, it would have done so expressly, using an established term like "willful," as it did elsewhere in the CCPA. See *Safeco Ins. Co. of Am.* v. *Burr*, 551 U.S. 47, 57 (2007). Instead, Congress provided that ignorance of the law would shield a debt collector only from civil penalties.

Furthermore, a debt collector cannot establish that it "maint[ains] * * * procedures reasonably adapted to avoid any" mistake of law. Legal errors cannot be eliminated by the implementation of any step-by-step algorithm. Rather, evaluating the legality of a debt-collection practice requires the application of legal judgment. Indeed, in a variety of circumstances, different lawyers may evaluate identical facts but reach different conclusions about their legality. The ordinary meaning of the term "procedures" does not encompass such a non-mechanical process.

The structure and legislative history of the FDCPA confirm that maintaining general awareness of the FDCPA and cases interpreting it does not constitute

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was unintentional, not that the communication itself was unintentional." Pet. App. 15a (brackets in original) (quoting *Lewis* v. *ACB Bus. Servs., Inc.*, 135 F.3d 389, 402 (6th Cir. 1998)).

an adequate "procedure." Congress provided that the FTC may authoritatively resolve interpretive questions through advisory opinions. 15 U.S.C. 1692k(e). But if legal ambiguity were a defense, debt collectors would have every incentive *not* to seek advisory opinions that would clarify the law. In effect, civil liability under the FDCPA would be limited to practices that have been clearly held to violate the statute. That is not the framework Congress established.

B. The FDCPA's "bona fide error" provision was based on a substantively identical provision of TILA and incorporated that provision's settled meaning, which excluded mistakes of law. Congress later amended TILA to *ratify* that settled construction, providing expressly that a mistake of law is not a "bona fide error" for purposes of the affirmative defense. Contrary to the holding below, by amending TILA's "bona fide error" defense to exclude legal errors and include (*inter alia*) computer errors, Congress did not implicitly direct courts to give the *opposite* interpretation to the various other statutes (including the FDCPA) that contain identical language. TILA's "bona fide error" defense did not extend to mistakes of law either before or after the clarifying amendment. It would be altogether incorrect to read that amendment as *creating* just such a mistake-of-law defense in statutes to which the amendment did not even refer. Indeed, substantively identical "bona fide error" defenses appear in other federal statutes and regulations, yet none of the responsible federal agencies has ever endorsed reading in a mistake-of-law defense, and some have expressly rejected such a reading. See, *e.g.*, 24 C.F.R. 3500.15(b)(1)(ii) ("An error of legal judgment * * * is not a *bona fide* error.").

C. This Court has held that attorneys may be debt collectors under the FDCPA. *Heintz* v. *Jenkins*, 514 U.S. 291 (1995). Some courts have misread *Heintz* as contemplating that these attorney debt collectors could use the "bona fide error" defense to excuse *legal* errors. But the Court in *Heintz* announced no such special rule for attorneys. Rather, when attorneys collect debts for clients, they are treated just like any other debt collector under the FDCPA. Thus, when attorney debt collectors make factual or clerical errors—such as the error respondents apparently made in believing petitioner's mortgage subject to foreclosure—they may rely on the "bona fide error" defense just as other debt collectors do. The notion that the defense must include mistakes of law or else be useless to attorneys is mistaken.

ARGUMENT

The elements of the FDCPA's affirmative defense; the structure of the Act's provisions for civil and administrative remedies; and the long history of the "bona fide error" language that Congress incorporated into the FDCPA all confirm that Congress did not create a safe harbor for incorrect legal judgments. The court below nonetheless construed the FDCPA's "bona fide error" defense in a way that Congress and administrative agencies have expressly rejected under other, identically-worded statutes. The court of appeals' judgment should be reversed.

A. The FDCPA's Text And Structure Demonstrate That The "Bona Fide Error" Defense Does Not Encompass Violations Resulting From A Debt Collector's Mistake Of Law

To invoke the FDCPA's affirmative defense, a debt collector must prove that its violation was "not inten-

tional" and that the violation "resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." 15 U.S.C. 1692k(c). A debt collector's deliberate and voluntary action is "intentional" even if the debt collector misunderstands the relevant law. Moreover, no procedure is properly viewed as "reasonably adapted to avoid any" error of law. The natural import of those statutory terms is reinforced by another FDCPA provision that authorizes the FTC to clarify the law by issuing authoritative public rulings, rather than leaving individual debt collectors alone to make legal judgments.

1. A debt collector's ignorance of the law is insufficient to make a violation "not intentional"

To establish the "bona fide error" defense, a debt collector must show that its violation of the FDCPA was "not intentional." A debt collector acts "intentionally," within the established meaning of that term, when it intends to take the action. Even if the debt collector believes its action to be lawful—whether through misinterpretation or ignorance of the law—its conduct remains "intentional." Congress rarely permits a defendant to escape liability based on ignorance of the law, and will only be found to do so—particularly in a civil consumer-protection statute that imposes strict regulation on an industry—when it expresses this intent clearly, using a term of art such as "willfully."

a. In the context of a civil-liability statute, the term "intentional" has an established meaning: an act is intentional when the actor means to do it. See, *e.g.*, *Black's Law Dictionary* 28 (9th ed. 2009) (explaining that "[a]n act is intentional when it is foreseen and desired by the doer"); *ibid.* (an act is unintentional when it

does "not result[] from the actor's will toward what actually takes place").[7] An unlawful action may be intentional, and therefore actionable, even if the actor lacked knowledge that her conduct would violate the law. See, *e.g.*, *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526, 536-537 (1999) (explaining that an employer may commit "intentional discrimination" while either being "unaware of the relevant federal prohibition" or "distinct[ly] belie[ving] that its discrimination is lawful"). The same is true under the common law of torts, see, *e.g.*, Restatement (Second) of Torts § 164 & cmt. e (1965) (a person commits the intentional tort of trespass even when she mistakenly believes she has a legal right to enter the property), which this Court has found instructive in construing civil-liability provisions of the CCPA, see *Safeco Ins. Co. of Am.* v. *Burr*, 551 U.S. 47, 57 (2007) (construing the term "willfully").

It is a longstanding principle that, absent a clear expression of contrary congressional intent, "ignorance of the law is no defense," *United States* v. *International Minerals & Chem. Co.*, 402 U.S. 558, 563 (1971) (*International Minerals*). That is particularly so in the civil context, where the need to provide fair warning is not as great as in criminal cases, see, *e.g.*, *Ratzlaf* v. *United States*, 510 U.S. 135, 148-149 (1994). See also *Torres* v. *INS*, 144 F.3d 472, 474 (7th Cir. 1998) (Posner, J.) ("Ignorance of a statute is generally no defense even to a criminal prosecution, and it is never a defense in a civil case, no matter how recent, obscure, or opaque the stat-

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[7] On occasion, Congress has used the word "intentional" as one part of a term of art with a different meaning. See Privacy Act of 1974, 5 U.S.C. 552a(g)(4) ("intentional or willful"); *Doe* v. *Chao*, 540 U.S. 614, 642 (2004) (Breyer, J., dissenting) (citing "prevailing interpretation" of this term of art).

ute."). Thus, when Congress intends for a defendant's knowledge or reckless disregard of the law to be considered, it commonly uses the term "knowingly" or "willfully." See *Safeco*, 551 U.S. at 57 ("[W]here willfulness is a statutory condition of civil liability, we have generally taken it to cover not only knowing violations of a standard, but reckless ones as well."); *id.* at 59 (on that understanding, "knowing violations are sensibly understood as a more serious subcategory of willful ones"); accord, *e.g.*, *TWA* v. *Thurston*, 469 U.S. 111, 126 (1985).

b. In enacting the various titles of the CCPA, including the FDCPA, Congress generally adhered to the common law distinctions among "knowing," "willful," and "intentional" violations. When Congress intended to require proof that the defendant knew the law, it expressed that intent clearly. This Court recently recognized as much in considering the requisites of "willful[]" violations of the Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681 *et seq.*, which is Title VI of the CCPA. See *Safeco*, 551 U.S. at 57-58. Congress presumptively intended those terms to have the same meaning throughout the CCPA. See, *e.g.*, *Commissioner* v. *Keystone Consol. Indus., Inc.*, 508 U.S. 152, 159 (1993); *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992).

Moreover, through its incorporation of the FTC Act, see 15 U.S.C. 1692*l*, the FDCPA itself distinguishes between ordinary violations and violations undertaken with knowledge of the law. As noted above, a debt collector that violates the FDCPA is subject to actual damages, statutory damages, and attorney's fees unless its violation is "not intentional" and satisfies the other requirements of the "bona fide error" defense. And the debt collector is subject to administrative-enforcement actions irrespective of its knowledge. FTC Act §§ 5(b),

13(b), 15 U.S.C. 45(b), 53(b). But if the debt collector has "actual knowledge" that its "act * * * is prohibited by [the FDCPA]," or if such knowledge is "fairly implied" by the "objective circumstances," then it is also subject to civil penalties of up to $16,000 per day. FTC Act § 5(m)(1)(A) and (C), 15 U.S.C. 45(m)(1)(A) and (C); see p. 4, *supra*.

Thus, in authorizing administrative enforcement under the FTC Act, Congress specified that FDCPA violations committed with actual knowledge of the law are punished more severely, but that ignorance of the law does not excuse a violation. And there is reason to believe that Congress incorporated the FTC Act's enforcement framework with full awareness of its categories of relief and penalties. The FTC Act is incorporated throughout the CCPA, and in some instances Congress has provided that aspects of the FTC Act's civil-penalty regime shall not apply, or shall apply differently. See FCRA § 621(a)(2) and (3), 15 U.S.C. 1681s(a)(2) and (3). Congress made no such change to the rule for "know[ing]" violations in the FDCPA. The natural inference is that Congress understood that "intentional" violations of the FDCPA would be subject to the general set of penalties and that the smaller set of "knowing" violations would be subject to additional penalties.

c. Some courts have suggested that the word "intentional" should not be given its commonly understood meaning in the FDCPA because the "bona fide error" defense requires defendants to prove "that *the violation* was not intentional." 15 U.S.C. 1692k(c) (emphasis added); see, *e.g.*, *Frye* v. *Bowman, Heintz, Boscia & Vician, P.C.*, 193 F. Supp. 2d 1070, 1088 (S.D. Ind. 2002). But that formulation does not show that Congress meant to refer to an intention to violate the law. Rather, Con-

gress simply used "the violation" as shorthand for "the conduct triggering liability under the statute." In *Bryan* v. *United States*, 524 U.S. 184 (1998), this Court rejected the contention that, in a criminal statute, "the statutory language—'willfully violates any other provision of this chapter'—indicates a congressional intent to attach liability only when a defendant possesses specific knowledge of the 'provision[s] of [the] chapter.'" *Id.* at 199 n.33 (quoting 18 U.S.C. 924(a)(1)(D)) (brackets in original).[8] Rather, the Court construed that phrasing as "a shorthand designation for specific acts or omissions which violate the [statute]," not as "an exception to the rule that ignorance of the law is no excuse." *Ibid.* (quoting *International Minerals*, 402 U.S. at 562).

d. Properly construed, the FDCPA's "bona fide error" defense thus requires the defendant to establish that it did not intend to engage in the prohibited conduct. A defendant cannot carry that burden by showing that it mistook the legal consequences of its volitional acts or that it did not intend to violate the law. In this case, respondents acted intentionally in drafting the validation notice and sending it to petitioner. Even if respondents believed based on legal research that the notice accurately stated the law, their conduct was "intentional" within the usual understanding of that term.

2. There are no "procedures reasonably adapted" to avoid legal error

Even if the phrase "not intentional" could be read to encompass legal errors, another aspect of the FDCPA's

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[8] The term "willfully" has a different meaning in criminal than in civil statutes, see *Safeco*, 551 U.S. at 57 n.9, but the *Bryan* Court's explanation of the intersection between the mental-state requirement and the term "violat[ion]" is equally applicable in the civil context.

text independently makes clear that mistakes of law do not shield a debt collector from liability. To invoke the "bona fide error" defense, a debt collector must establish both "that the violation was not intentional *and* [that it] resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." 15 U.S.C. 1692k(c) (emphasis added). The Act's damages provision specifies that "the extent to which [a debt collector's] noncompliance was intentional" is one factor to be considered in setting the statutory damages. 15 U.S.C. 1692k(b)(1) and (2). Congress thus clearly contemplated that, in some circumstances, a plaintiff could establish liability, and potentially receive statutory damages, for *unintentional* violations. By requiring as an element of the "bona fide error" defense that the defendant "maintain[] * * * procedures reasonably adapted to avoid any such error," Congress confirmed that legal errors, however inadvertent, cannot qualify for the defense. Both in common usage and in practical effect, there are no "procedures reasonably adapted" to preventing mistakes of law.

a. Legal reasoning is not a purely mechanical process, and no "procedure" can definitively avoid the misapplication or misinterpretation of a comprehensive federal statute. A procedure is "a series of steps followed in a regular orderly definite way." *Webster's Third New International Dictionary* 1807 (1986). Following the steps of legal research and analysis can answer some basic questions, because some specific conduct is unambiguously prohibited by the statute, and other conduct has been widely held by the courts to be prohibited. Under the FDCPA, however, a procedure qualifies for the "bona fide error" defense only if it is "reasonably adapted to avoid *any such* error." In the many instanc-

es in which neither the statutory text nor controlling judicial decisions unambiguously resolve a particular interpretive question, the application of legal analysis, however careful or precise, cannot yield a definitive answer. Although methods of legal research and analysis may assist debt collectors in reaching informed judgments as to the lawfulness of particular conduct, such methods are not naturally described as "procedures" for "avoid[ing]" legal error.

This very case illustrates the point. Respondents included in their validation notice a requirement that petitioner dispute her debt in writing—a requirement on which the courts of appeals are divided and which "[t]he majority of district courts" have rejected. Br. in Opp. App. 8-9 (citing precedential decisions of the Third and Ninth Circuits and seven district court opinions dating back to 1995). To the extent respondents analyzed the legality of their form validation notice, see Pet. App. 39a, their decision to include a written-dispute requirement rested neither on clear statutory language nor on a judicial consensus that such a requirement was lawful, but instead on their assessment that the minority view among the lower courts represented the sounder interpretation of the FDCPA. Particularly in circumstances of this kind, which are not uncommon in the context of a complex statutory scheme, legal research and education do not constitute the sort of "procedure" that is "reasonably adapted" to "avoid any * * * error."

b. The structure of the FDCPA reinforces the conclusion that a debt collector is not immune from civil liability under the Act simply because the legality of its conduct was subject to good-faith dispute at the time. In addition to enumerating more than two dozen examples of abusive, misleading, and unfair practices, see 15

U.S.C. 1692d-1692f, the FDCPA generally prohibits "any" harassing or abusive conduct, "any" deceptive or misleading representation, and all "unfair or unconscionable means" of collecting debts. *Ibid.* The Act provides that the enumerated examples do not "limit[] the general application" of those prohibitions. *Ibid.*; see *Senate Report* 4 (explaining that "[o]ther improper conduct which is not specifically addressed" will nonetheless be found unlawful by the courts).[9] In light of the breadth of the FDCPA's prohibitions, activities such as reviewing reported cases and taking continuing-education classes in debt-collection law cannot be thought sufficient to "avoid any" violation of the Act. And to immunize all conduct not previously (and unanimously) held unlawful would defeat Congress's purpose in extending the Act's coverage beyond the enumerated examples of unlawful debt-collection practices.

When conduct is unlawful but a reasonable person might think otherwise, Congress sometimes provides that a reasonable mistake of law is a defense to liability. Qualified immunity under 42 U.S.C. 1983 is one example. See, *e.g.*, *Johnson* v. *Fankell*, 520 U.S. 911, 919 (1997) ("[T]he ultimate purpose of qualified immunity is to protect the State and its officials from overenforcement of federal rights."). The FDCPA, however, contains no indication that Congress regarded "overenforcement" as a potential problem. To the contrary, the purpose of authorizing statutory damages, in addition to actual dam-

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[9] Senator Riegle, the FDCPA's chief sponsor, explained during the committee markup that "we want to have the courts available to deal with nuances that otherwise might escape here because they didn't fit the exact prescribed sort of letter of the specific abuse we have been able to outline." Senate Comm. on Banking, Housing & Urban Affairs, *Markup on Debt Collection Legislation* 71 (June 30, 1977).

ages, is to deter violations and ensure that consumers' rights under the Act do not go *under*enforced.

3. Extending the "bona fide error" defense to mistakes of law would subvert the FTC's statutory role in interpreting the FDCPA

Debt collectors can obtain clarification of ambiguous FDCPA requirements, and avoid civil liability, by seeking advisory opinions from the FTC. 15 U.S.C. 1692k(e). The significance of that mechanism would be greatly diminished if debt collectors could rely instead on their *own* "procedures" for avoiding legal errors. The important role that the FDCPA assigns to the FTC is a further contextual reason to reject the court of appeals' interpretation of the "bona fide error" defense.

In seeking the FTC's advice about the correct interpretation of a provision of the FDCPA, a debt collector informs the FTC that it is contemplating action that might violate the Act. And if the debt collector subsequently engages in conduct that is inconsistent with the FTC's response, the collector is potentially subject to the substantial civil penalties that apply to knowing violations. See FTC Act § 5(m)(1)(A) and (C), 15 U.S.C. 45(m)(1)(A) and (C); see also 15 U.S.C. 1692*l*(a). By contrast, under the court of appeals' interpretation of the "bona fide error" defense, a debt collector that engages in sufficient legal research and analysis to identify an ambiguity in the law can simply adopt its preferred reading and will be immune from civil liability so long as that reading is not clearly incorrect.

Thus, the court of appeals' interpretation of the "bona fide error" defense would seriously undermine the FDCPA's advisory-opinion procedure. If the "bona fide error" defense encompasses errors of law, debt collec-

tors will have little if any incentive to seek an advisory opinion from the FTC. To the contrary, because an advisory opinion finding a particular practice to be unlawful would resolve the ambiguity and thus eliminate the debtor's immunity from civil liability for continued violations, the court of appeals' approach would create a substantial disincentive to invocation of that clarifying mechanism.

Such a disincentive would be at odds with the statutory framework. An FTC advisory opinion is a public document that can further the overall administration of the Act, both by helping the party that requests the opinion to comply with its legal obligations, and by clarifying the law for the benefit of debt collectors and debtors generally. See 16 C.F.R. 1.4.[10] By contrast, a debt collector's own legal analysis often will not be made known to others unless the debt collector is sued and relies on the "bona fide error" defense. And if that affirmative defense is read to encompass mistakes of law, the court in such a suit may resolve the case without deciding the underlying question of FDCPA interpretation. See, *e.g.*, Pet. App. 5a n.2 (not reaching the question whether respondents' initial notice violated the FDCPA). The court of appeals' reading of the "bona fide error" defense thus undercuts the FTC's clarification and elaboration of the FDCPA's requirements in a manner at odds with Congress's purpose. See pp. 17-19, *supra*.

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[10] Under its rules, the FTC issues advisory opinions in response to substantial or novel legal questions of law, or to address issues of significant public interest. 16 C.F.R. 1.1-1.4. FTC advisory opinions with respect to the FDCPA are set forth at http://www.ftc.gov/os/statutes/fdcpajump.shtm.

4. The legislative history confirms that the FDCPA's "bona fide error" defense does not extend to mistakes of law

a. During the Senate Banking Committee's consideration of the FDCPA, some Senators proposed adding a requirement that a plaintiff prove that the violation was a knowing one. That amendment was withdrawn in the face of substantial opposition. The Act's chief sponsor, Senator Riegle, confirmed that willfulness was not intended to be a prerequisite to civil liability because "certain things ought not to happen, period": the prohibited practices are "illegal and wrong," and "whether somebody does it knowingly, willfully, you know, with a good heart, bad heart, is really quite incidental." Senate Comm. on Banking, Housing & Urban Affairs, *Markup Session: S. 1130—Debt Collection Legislation* 60 (July 26, 1977). By contrast, Senator Riegle confirmed that if a debt collector violated the Act truly "by accident" and "didn't intend for the effect to be as it was," it could invoke the affirmative defense, such as by "say[ing], I didn't know that, or my computer malfunctioned." *Ibid.*

The legislative history also indicates that Congress viewed the need to prove an offender's mental state as a problem with the pre-existing law and a reason the FDCPA was needed. For example, the FDCPA regulates the use of the mails for debt-collection purposes. See, *e.g.*, 15 U.S.C. 1692f(7) and (8). The House Committee Report explained that existing postal-regulation laws were inadequate for various reasons, including that they "frequently require specific intent which is difficult to prove." H.R. Rep. No. 131, 95th Cong., 1st Sess. 3 (1977) (*House Report*).

b. Respondents rely (Br. in Opp. 19-20) on the Senate Banking Committee's statement that "[a] debt col-

lector has no liability * * * if he violates the act in any manner, including with regard to the act's coverage, when such violation is unintentional and occurred despite procedures designed to avoid such violations." *Senate Report* 5. The Tenth Circuit viewed the Report's reference to "the act's coverage" as an indication that the "bona fide error" defense applies to mistakes of law. *Johnson* v. *Riddle*, 305 F.3d 1107, 1123 (10th Cir. 2002) (emphasis omitted). But the committee's reference to "coverage" is more naturally read to refer to *factual* mistakes bearing on the FDCPA's applicability to particular situations. For instance, a debt collector's factual mistake could lead the collector erroneously to conclude that a particular obligation arose out of a commercial rather than a consumer transaction and therefore was not covered by the FDCPA's definition of "debt," 15 U.S.C. 1692a(4). See *Edwards* v. *McCormick*, 136 F. Supp. 2d 795, 799-800 (S.D. Ohio 2001). Similarly, the FDCPA's definition of "debt collector" contains several exceptions that turn on facts about the nature of the debt being collected, see 15 U.S.C. 1692a(6)(F)(ii)-(iv), and those facts could be the subject of record-keeping errors.

The Sixth Circuit in this case focused on a different aspect of the Senate committee report quoted above—the statement that a debt collector can invoke the defense "if he violates the act in *any* manner." Pet. App. 14a (quoting *Senate Report* 5). The same sentence of the report makes clear, however, that the "bona fide error" defense applies only if the violation is "unintentional and occurred despite procedures designed to avoid such violations." *Senate Report* 5. As explained above, a legal error satisfies neither element of the defense. Even read in isolation, the committee's statement merely rec-

ognizes that any manner of violating the Act—whether communicating at an impermissible time, using an unfair collection practice, or sending an improper validation notice—could conceivably result from a bona fide error. It does not suggest that any manner of *error* qualifies for the "bona fide error" defense, let alone speak to the question whether a debt collector can establish each element of the defense by demonstrating that its violation resulted from a mistake of law.

B. The History Of The "Bona Fide Error" Defense And Its Use In Other Statutes Show That It Does Not Encompass Legal Error

The FDCPA's "bona fide error" defense is not unique. The defense was drawn directly from an identical provision that had been in the CCPA since its enactment, and other titles of the CCPA contain equivalent provisions. The consistent judicial and administrative interpretation of the language has been that the defense does not encompass mistakes of law. There is no sound basis for attributing a different meaning to the same language as it appears in the FDCPA.

1. The FDCPA incorporated the settled judicial construction of an identical text

a. TILA was the first title of the original CCPA. As enacted, TILA contained an affirmative defense that was identical in all respects to the FDCPA provision at issue here. See TILA, Pub. L. No. 90-321, Tit. I, § 130(c), 82 Stat. 157 (1968) ("A creditor may not be held liable in any action brought under this section for a violation of [TILA] if the creditor shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid

any such error."); accord 15 U.S.C. 1640(c) (1976) (same at the time of the FDCPA's enactment).

During the nine years between TILA's enactment and the FDCPA's, that affirmative defense was consistently construed to exclude legal errors. At least three circuits had reached that conclusion by the time the FDCPA was enacted, and none had ruled to the contrary. See *McGowan* v. *King, Inc.*, 569 F.2d 845, 849 (5th Cir. 1978) (listing cases). Some of those courts reasoned that the term "intentional" does not turn on specific intent to violate the law. See, *e.g.*, *Haynes* v. *Logan Furniture Mart, Inc.*, 503 F.2d 1161, 1166-1167 (7th Cir. 1974); *Ratner* v. *Chemical Bank N.Y. Trust Co.*, 329 F. Supp. 270, 281 (S.D.N.Y. 1971) ("That defendant, in this Court's view, mistook the law does not make its action any less intentional."); accord *Ives* v. *W.T. Grant Co.*, 522 F.2d 749, 757-758 (2d Cir. 1975) (following *Ratner*). Others pointed out the infeasibility of devising "procedures reasonably adapted" to prevent legal errors. *Palmer* v. *Wilson*, 502 F.2d 860, 861 (9th Cir. 1974); *Haynes*, 503 F.2d at 1167. The strong consensus confirmed that the TILA "bona fide error" defense did not cover legal errors.[11]

Congress's verbatim inclusion in the FDCPA of preexisting language from TILA is naturally understood to incorporate the settled judicial construction of the

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[11] District courts within the Fifth Circuit were divided on the question at the time the FDCPA was enacted, with the Fifth Circuit resolving the issue a few months later. See *McGowan*, 569 F.2d at 849. A nonprecedential, widely rejected district court decision does not detract from the settled appellate consensus that Congress ratified. See *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 385-386 & n.21 (1983) (recognizing that Congress ratified a "well-established judicial interpretation" notwithstanding two contrary district court decisions).

TILA "bona fide error" defense. See, *e.g.*, *Rowe* v. *New Hampshire Motor Transp. Ass'n*, 128 S. Ct. 989, 994 (2008); accord *Bragdon* v. *Abbott*, 524 U.S. 624, 644-645 (1998) (concluding that Congress had ratified the consensus view of the federal appellate and district courts); *Lorillard* v. *Pons*, 434 U.S. 575, 580 & n.7 (1978) (same). That presumption is reinforced by the legislative history, which confirms that the sponsors consciously modeled the FDCPA's remedial provisions on TILA's remedial scheme. See, *e.g.*, 123 Cong. Rec. 10,242 (1977) (remarks of Rep. Annunzio) (noting that the House bill provided for civil penalties "consistent with those in the Consumer Credit Protection Act");[12] *Fair Debt Collection Practices Act: Hearings on S. 656, S. 918, S. 1130 and H.R. 5294 Before the Subcomm. on Consumer Affairs of the Senate Comm. on Banking, Housing & Urban Affairs*, 95th Cong., 1st Sess. 51, 54 (1977) (statement of Rep. Wylie) (describing the FDCPA's civil-liability provisions as "the standard provisions that attach to all the titles of the Consumer Credit Protection Act"); see also *id.* at 3, 5 (statements of Sens. Schmitt and Garn) (opposing the FDCPA because it was modeled on TILA, which those Senators regarded as having proved problematic). The FDCPA's "bona fide error" defense therefore should be construed as Congress would have understood it in 1978: as incorporating the consensus interpretation of the identical words in the model statute.

b. The court below declined to rely on the interpretation of TILA's "bona fide error" defense that prevailed

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[12] The House bill was amended substantially in the Senate, but throughout the bill's consideration in both chambers, the language of the "bona fide error" defense remained identical to the language of its counterpart in TILA. See, *e.g.*, *House Report* 23.

at the time of the FDCPA's enactment. Pet. App. 13a-14a. Instead, the court focused on another statute, enacted three years after the FDCPA, in which Congress amended TILA to ratify that prevailing interpretation. The court of appeals inferred that Congress, by expressly ratifying the settled construction of TILA, had implicitly signaled that the FDCPA should be read differently. That reasoning is erroneous.

Three years after enacting the FDCPA, Congress enacted the Truth in Lending Simplification and Reform Act (TILA Simplification Act), Pub. L. No. 96-221, Tit. VI, 94 Stat. 168 (1980). In that statute, Congress added an explanatory sentence to TILA's "bona fide error" defense: "Examples of a bona fide error include, but are not limited to, clerical, calculation, computer malfunction and programing, and printing errors, except that an error of legal judgment with respect to a person's obligations under [TILA] is not a bona fide error." § 615(a)(3), 94 Stat. 181. The Senate committee report explained that the legislation "clarified" the defense "to make clear that it applies to mechanical and computer errors" and not to "erroneous legal judgments as to the Act's requirements." S. Rep. No. 73, 96th Cong., 1st Sess. 7-8 (1979). The legislation did not amend any other provision of the CCPA. Thus, Congress codified the prevailing interpretation of TILA's "bona fide error" defense as excluding mistakes of law, while making clear that the defense encompassed four other enumerated types of errors.[13]

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[13] Explaining the need for the TILA Simplification Act, a leading trade association of banks regulated by TILA had told the Senate committee that "it has always been open to question what exactly constitutes a bona fide error." *Truth in Lending Simplification & Reform Act: Hearings on S. 108 and S. 37 Before the Senate Comm. on Bank-*

The court of appeals viewed the 1980 amendment to TILA, together with Congress's failure to amend the FDCPA in a like manner, as "suggest[ing] that, unlike the TILA, Congress did not intend to limit the [FDCPA] defense to clerical errors." Pet. App. 13a-14a. That reasoning is misconceived. An amendment to TILA enacted in 1980 does not directly shed light on the intent of the Congress that enacted the FDCPA in 1977. But to the extent that the 1980 TILA amendment bears on the interpretive question presented here, it supports petitioner's understanding of the FDCPA's "bona fide error" defense rather than the interpretation of the court of appeals. The TILA amendment is phrased as an explanation of what the term "bona fide error" *means*, see § 615(a)(3), 94 Stat. 180-181 ("[A]n error of legal judgment with respect to a person's obligations under [TILA] is not a bona fide error."), and the legislative history describes the amendment as "clarif[ying]" rather than altering the scope of the defense, p. 26, *supra*. Those features of the amendment strongly suggest that the 1980 Congress would have understood the FDCPA's "bona fide error" defense, like the identically-worded defense contained in TILA, to be inapplicable to mistakes of law.[14]

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ing, Housing & Urban Affairs, 94th Cong., 1st Sess. 87 (1979) (statement of David S. Smith, Jr., of the American Bankers Assocation).

[14] On two further occasions after the 1980 TILA amendment, Congress enacted language similarly specifying that "bona fide error" defenses in other statutes may not be premised on mistakes of law. See Expedited Funds Availability Act § 611(c)(2), 12 U.S.C. 4010(c)(2) ("[A]n error of legal judgment with respect to a depository institution's obligation under [the statute] is not a bona fide error."); Truth in Savings Act, Pub. L. No. 102-242, § 271(c), 105 Stat. 2340-2341 (1991) (same) (repealed 1996).

In addition to confirming the defense's inapplicability to mistakes of law, the 1980 TILA amendment identified four categories of mistakes ("clerical, calculation, computer malfunction and programing, and printing errors") as "[e]xamples of a bona fide error" on which the TILA defense may be premised. § 615(a)(3), 94 Stat. 180-181. Because Congress did not add any similar provision to the FDCPA, the court of appeals' analysis logically suggests that such mistakes do not constitute "bona fide errors" within the meaning of that Act. But neither the Sixth Circuit nor (so far as we are aware) any other court has adopted that truncated view of the FDCPA's "bona fide error" defense. The implausibility of that construction underscores the impropriety of treating Congress's effort to clarify one statute as changing the meaning of another.

2. The court of appeals' decision is at odds with agency interpretations of identical language

Although no agency is authorized to issue interpretive regulations under the FDCPA, see 15 U.S.C. 1692*l*(d), federal agencies interpreting other statutes—including other titles of the CCPA—have interpreted "bona fide error" provisions that use language identical to that at issue here. No federal agency has construed such a provision to encompass mistakes of law, and one agency has expressly rejected that interpretation.

a. Under the Real Estate Settlement Procedures Act of 1974 (RESPA), 12 U.S.C. 2601 *et seq.*, real estate settlement businesses that maintain affiliated business arrangements must make certain disclosures to consumers in order to be exempt from RESPA's anti-kickback and unearned-fee provisions. 12 U.S.C. 2607(c)(4)(A). A violation gives rise to a private civil action for treble

damages, 12 U.S.C. 2607(d)(2), and defendants may defeat liability by proving "by a preponderance of the evidence that such violation was not intentional and resulted from a bona fide error notwithstanding maintenance of procedures that are reasonably adapted to avoid such error." 12 U.S.C. 2607(d)(3). The Secretary of Housing and Urban Development (HUD) is charged with implementing RESPA through interpretive regulations. 12 U.S.C. 2617(a). Following notice and comment, the Secretary has adopted a regulation specifying that "[a]n error of legal judgment with respect to a person's obligations under RESPA is not a bona fide error." 24 C.F.R. 3500.15(b)(1)(ii).

b. In addition to playing a role under the FDCPA, see note 2, *supra*, the Federal Reserve Board of Governors (Board) has principal authority to interpret several other titles of the CCPA through rulemaking. The Board has used that authority under two of those titles—the Equal Credit Opportunity Act (ECOA), 15 U.S.C. 1691 *et seq.* (Title VII of the CCPA), and the Electronic Fund Transfer Act (EFTA), 15 U.S.C. 1693 *et seq.* (Title IX of the CCPA)—to define similar defenses as limited to clerical and technical errors.

The EFTA contains "bona fide error" defenses worded identically to those in TILA and the FDCPA. See EFTA §§ 910(c), 915(c), 15 U.S.C. 1693h(c), 1693m(c). The officials to whom the Board has delegated authority to interpret the EFTA (see EFTA § 915(d)(1), 15 U.S.C. 1693m(d)(1); 12 C.F.R. Pt. 205, App. C) have promulgated interpretive guidance, pursuant to notice and comment, in which the examples of "bona fide errors" are limited to the sort of mechanical, clerical, and other nonvolitional errors discussed above. See, *e.g.*, 12 C.F.R. Pt. 205 Supp. (comment 1 to 12 C.F.R. 205.3(b)(2))

("when a terminal printing mechanism jams"); *ibid.* (comment 5 to 12 C.F.R. 205.9(a)) (similar); *ibid.* (comment 7 to 12 C.F.R. 205.10(b)) (mistaken reliance on a customer's representation about whether he is using a credit or debit card).

Similarly, exercising its regulatory authority under the ECOA, the Board has long rejected the notion that a mistake of law should be sufficient to excuse a rule violation. The Board has provided that a creditor's failure to comply with certain regulations promulgated under the ECOA "is not a violation if it results from an inadvertent error." 12 C.F.R. 202.16(c). Since before the FDCPA was enacted, the Board has defined "inadvertent error" much as Congress framed the "bona fide error" defense in the other titles of the CCPA: as "a mechanical, electronic, or clerical error that a creditor demonstrates was not intentional and occurred notwithstanding the maintenance of procedures reasonably adapted to avoid such errors." 12 C.F.R. 202.2(s); see 42 Fed. Reg. 1243 (1977). And the interpretive guidance, issued after notice and comment pursuant to authority delegated by the Board (see ECOA § 706(e), 15 U.S.C. 1691e(e); 12 C.F.R. Pt. 202, App. D), explains that "[a]n error of legal judgment is not an inadvertent error under the [ECOA] regulation." 12 C.F.R. Pt. 202 Supp. (comment 1 to 12 C.F.R. 202.16).

The consistent administrative practice of these federal agencies, including one with a substantial regulatory role under the CCPA, is further evidence that the court of appeals in this case misinterpreted the "bona fide error" defense. Indeed, affirming the decision below would introduce a notable disuniformity into federal

consumer-protection statutes that all use the same language.[15]

C. This Court's Decision In *Heintz* Does Not Support The Ruling Below

Lower courts that have adopted respondents' view of the FDCPA's "bona fide error" defense have also relied in part on *Heintz* v. *Jenkins*, 514 U.S. 291 (1995), in which this Court held that attorneys may be "debt collectors" subject to the Act. In *Heintz*, the attorney petitioners argued that such a construction would lead to absurd consequences, such as imposing liability on "any litigating lawyer who brought, and then lost, a claim against a debtor." *Id.* at 295. The Court explained that bringing an unsuccessful legal action would not, by itself, violate the FDCPA's substantive prohibitions. *Id.* at 295-296. The Court also observed that even a debt collector who violates the FDCPA can still invoke the "bona fide error" defense. *Id.* at 295. The Court therefore found the possibility of civil liability for unsuccessful debt-collection suits to provide an inadequate basis for treating attorneys as beyond the FDCPA's purview.

The Court in *Heintz* did not address the scope of the FDCPA's "bona fide error" defense and had no occasion to decide whether it encompasses mistakes of law. The defense remains available to attorneys, moreover, even if it does not extend to erroneous legal analyses. In *Heintz*, for example, the attorneys had attempted to collect from the plaintiff an amount that was not autho-

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[15] Even if this Court were to agree with the Sixth Circuit in this case, contrary agency interpretations of RESPA or the EFTA presumably would remain entitled to deference under the rule of *National Cable & Telecommunications Ass'n* v. *Brand X Internet Services*, 545 U.S. 967 (2005).

rized by law because their client had told them it was due and owing. On remand after this Court's decision, the court of appeals held that the attorneys had established the "bona fide error" defense because they had not known that unauthorized charges were included in the amount they were seeking to collect, and because they had adhered to the procedure of "insist[ing] that their client verify under oath that each of the charges was true and correct." *Jenkins* v. *Heintz*, 124 F.3d 824, 834 (7th Cir. 1997), cert. denied, 523 U.S. 1022 (1998).

Similarly in this case, the foreclosure action filed by respondents was premised on a mistake of fact. See Pet. App. 2a-3a. But respondents are alleged to have violated the FDCPA not by mistakenly filing that action, but instead by sending petitioner (and numerous unnamed class members) an incorrect and unlawful validation notice. Unlike the filing of the lawsuit, respondents' creation and provision of that notice was not attributable to any factual mistake (or to inadvertence). Rather, it reflected respondents' allegedly incorrect view that the written-dispute requirement comports with the FDCPA. See Opp. to Mot. for Summ. J. Exh. A at 39 (McNellie Dep. 84-85). That the "bona fide error" defense is available to lawyers acting as debt collectors does not mean it covers errors of that nature.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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SEPTEMBER 2009

AMICUS CURIAE BRIEF

No. 08-1200

IN THE

Supreme Court of the United States

KAREN L. JERMAN,

Petitioner,

v.

CARLISLE, McNELLIE, RINI, KRAMER & ULRICH LPA, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae ACA International ("ACA") is a non-profit corporation founded in 1939 and based in Minneapolis, Minnesota. ACA is an association of credit, collection, and debt-purchasing professionals who provide a wide variety of accounts-receivable management services. ACA's interests in this matter are both public and private.

ACA represents approximately 5,200 third-party collection agencies, asset buyers, attorneys, credit grantors, and vendor affiliates. ACA's members include sole proprietorships, partnerships, and corporations ranging from small businesses to firms employing thousands of workers. Also included among its membership are 3,400 third-party debt collection companies, 750 credit grantors, eighty asset buyers, and more than 800 in-house, compliance, defense, or collection attorneys.

ACA members range in size from small businesses with several employees to large, publicly held corporations. Together, ACA members employ close to 150,000 collectors. These members include the very smallest of businesses that operate within a limited geographic range of a single state as well as the very

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and such consents are being lodged herewith.

largest of multinational corporations that operate in every state and non-U.S. jurisdictions. Approximately 2,000 of the company members of ACA maintain fewer than ten employees. Many of the companies are wholly or partially owned or operated by minorities or women. ACA helps its members serve their communities and meet the challenges created by changing markets through leadership, education, and service. ACA continually educates its members and others on the law governing debt collection practices, including the Fair Debt Collection Practices Act.

In the process of attempting to recover outstanding accounts and balances, ACA members act as an extension of every community's businesses. They represent the local hardware store, the retailer down the street, and the family doctor. ACA members work with these businesses, large and small, to obtain payment for the goods and services delivered to consumers. Each year, the combined effort of ACA members results in the recovery of billions of dollars that are returned to business and then reinvested in local communities. Without an effective collection process, the economic viability of these businesses and, by extension, the local and national economies in general are threatened; at the very least, citizens would be forced to pay inflated prices to compensate for uncollected debts.

Finally, ACA members also assist governmental bodies in recovering unpaid obligations, a function that is increasingly important as many of our government clients face record budget deficits.

SUMMARY OF THE ARGUMENT

The Fair Debt Collection Practices Act is not unique in that its proper interpretation is frequently unsettled. A myriad of conflicting federal cases, published and unpublished, are being handed down by the federal appellate circuits and district courts on a regular basis. But the interpretation of the Act's bona fide error defense that Petitioner advances would unjustly punish those in the collection industry who are actually working hard on a daily basis to comply with the Act in spite of its unsettled state, to the competitive advantage of those who do not. The bona fide error defense is best viewed as an application of the longstanding rule of judgmental immunity, under which a lawyer is protected from liability when he or she exercises reasoned judgment as to an unsettled issue of law. The concerns that Petitioner and other amici raise about this interpretation of the bona fide error defense are unfounded. Accordingly, amicus ACA respectfully urges the Court to affirm the judgment of the Sixth Circuit in this case.

ARGUMENT

Amicus curiae ACA does not intend to discuss at great length the case law and legislative history that support affirming the judgment below on the ground that the bona fide error defense[2] in the Fair Debt Collection Practices Act applies to mistakes of law. Those arguments are covered comprehensively by the briefs of Respondents and the other amici arguing in favor of affirmance. Instead, this brief provides a real-life factual context for the issue

2. *See* Fair Debt Collection Practices Act § 813(c), 15 U.S.C. § 1692k(c).

presented and focuses on the several rationales and policies that should govern any interpretation of the bona fide error language of the statute.

THE BONA FIDE ERROR DEFENSE PROTECTS THE EXERCISE OF GOOD-FAITH, REASONED JUDGMENT BY COLLECTION PROFESSIONALS INTERPRETING THE FREQUENTLY UNSETTLED STATE OF FDCPA LAW.

To be sure, one purpose of the Fair Debt Collection Practices Act ("FDCPA" or "Act") is "to eliminate abusive debt collection practices by debt collectors." 15 U.S.C. § 1692(e) (2006). Petitioner and the amici supporting her stress only *that* purpose of the Act and ignore the second stated purpose: "to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged." *Id.* In other words, it was a specific intent of Congress that the Act *not* be interpreted to place those debt collectors who endeavor to comply with the law at a competitive disadvantage to those who do not. But that is precisely what Petitioner's position would do – impose a competitive disadvantage on those who devote considerable time and resources in a genuine effort to conform their practices to the requirements of the Act.

The ACA represents collectors, both attorneys and non-attorneys, who work diligently to comport their conduct to the law. But sometimes *knowing* with certainty what the law requires at any given point in time is impossible precisely because of unclear statutes and conflicting judicial interpretations.

This case is a good example of how the muddled and shifting state of FDCPA law can entrap even conscientious lawyers and collectors who do their best to comply with the Act. In 1991, the Third Circuit held that a consumer's dispute of a debt under the FDCPA must be in writing to be effective. *See Graziano v. Harrison*, 950 F.2d 107, 112 (3d Cir. 1991). Over the next few years, a number of district courts that addressed the same issue chose to disagree with *Graziano*. Then, in September 2004, the Sixth Circuit affirmed a finding that a form validation notice did not violate the FDCPA even though the notice stated that any dispute had to be in writing. *See Savage v. Hatcher*, 109 F. App'x 759, 762 (6th Cir. 2004), *aff'g in part and rev'g in part*, No. C-2-01-0089, 2002 WL 484986, at *4 (S.D. Ohio Mar. 7, 2002). The very next year, the Ninth Circuit held to the contrary, ruling that a debt collector's notice that stated the dispute must be in writing violated the FDCPA. *See Camacho v. Bridgeport Fin., Inc.*, 430 F.3d 1078, 1081-82 (9th Cir. 2005).

Thus, by April 2006, when the Respondent attorneys (who practice in the Sixth Circuit) filed the action against Petitioner, at least one other Circuit had held that a dispute must be in writing and the only Sixth Circuit decision on point suggested that a notice requiring a written dispute would not violate the FDCPA. The record below shows that Respondent lawyers, after careful research, made a judgment about the then-state of the law. (Br. of Resp. at 1-2.) As a result of later developments, it turned out that their judgment – a judgment based on unsettled law – was in error. But it was certainly an unintentional error, and it was a bona fide error – an error made notwithstanding the

maintenance of procedures reasonably adapted to avoid such errors.

The simple fact is this: later courts disagreed with prior law. The law became unsettled on this point. With all due respect, we submit that if the learned courts cannot agree on what the law is, it is manifestly wrong to impose strict liability under the FDCPA on lawyers and collectors who rely on such judicial decisions in good faith. The Respondent lawyers made a legal judgment after careful research about what the law required. Their legal judgment was deemed to be in error only in light of subsequently decided cases. Nonetheless, there was a legitimate legal basis for their acts and interpretations of the law at the time they made the supposed "error."

Bartlett v. Heibl, 128 F.3d 497 (7th Cir. 1997), presents another example of the practical problems posed by Petitioner's position here. There, in an opinion authored by Judge Richard A. Posner, the court took it upon itself to draft an "initial communication" or "dunning letter" and recommended that debt collectors could avoid liability under the FDCPA by "stick[ing] close to" the language of this recommended letter. *Id.* at 501-02. At a minimum, any collector within the Seventh Circuit could then, of course, rely on the *Bartlett* letter (and collectors outside of the Seventh Circuit would naturally rely on the sample letter as well). After all, the *Bartlett* letter had received the official imprimatur of the United States Court of Appeals, and Judge Posner is considered "a brilliant jurist, among the most respected in the United States." Joel Brinkley, *Microsoft Case Gets U.S. Judge as a Mediator*, N.Y.

Times, Nov. 20, 1999. Even so, a district court outside the Seventh Circuit later concluded that use of the *Bartlett* letter violated the FDCPA. *See Tipping-Lipshie v. Riddle*, No. CV 99-4646, 2000 WL 33963916 (E.D.N.Y. Mar. 2, 2000). Such liability under these circumstances defies logic. At worst a bona fide error occurred for which no FDCPA liability should have attached.

ACA's members ought to be able to rely on judicial determinations about what the statute means and when liability will be found. If they rely in good faith on a facially valid judicial opinion, and proceed accordingly, they should not be held liable under the FDCPA when a subsequent judicial decision "goes the other way." In other words, it should be permissible to be both (1) mistaken in predicting the resolution of an unsettled legal question and (2) not liable under the FDCPA. One should be able to have a good-faith bona fide statutory interpretation that a chosen course of conduct is permitted under FDCPA, based on careful study and case law research, without running the risk of being held liable if a different court later goes the other way on the issue.

After all, for the bona fide error exception to apply in the first instance, it must be true by definition that an "error" occurred. In addition, the burden always remains on the defendant to establish facts that would trigger the exception: that the legal error was (1) unintentional and (2) made as a result of a bona fide error, (3) notwithstanding the maintenance of procedures reasonably adapted to avoid any such error. *See* 15 U.S.C. § 1692k(c). Where those facts are all established, however, it makes no logical sense to

separate "legal errors" from "factual errors" with respect to the bona fide error defense.

In practice, an attorney or collector must occasionally make a judgment about how to proceed when the law is unsettled. If her analysis about what the law requires or allows turns out to be in error, should she be subject to a damage award under the FDCPA for incorrectly predicting the resolution of an unsettled point of law?

Such a holding would fly in the face of well-established law. As the preeminent treatise on legal malpractice notes: "The rule that an attorney is not liable for an error of judgment on an unsettled proposition of law is universally recognized." 2 Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* 1226 (Thomson West 2009) (giving a detailed account of the reason for the rule and how it developed). The treatise continues:

> What an attorney thinks the law is today may not be what a court decides tomorrow. Subjecting attorneys to liability simply because a judge disagrees can be unfair. After all, judges are lawyers who have the additional responsibility of declaring the law. Even judges concede that the infallibility of their opinions depends solely on the finality of their rulings.

Id. (footnotes omitted). This salient principle[3] has been recognized in the Anglo-American legal system for more than 200 years:

> Lord Mansfield concluded that the language of the relevant statute was unclear and reasoned that attorneys should not be liable for errors of judgment on debatable propositions: "Not only counsel, but judges may differ, or doubt, or take time to consider. Therefore an attorney ought not to be liable in cases of reasonable doubt." Thus, the rule was established that an attorney would not be liable for an error concerning a doubtful or debatable proposition of law.

Id. at 1231 (quoting *Pitt v. Yalden*, 98 Eng. Rep. 74 (K.B. 1767)).

This Honorable Court recognized and approved this rule of law 130 years ago in *National Savings Bank of District of Columbia v. Ward*:

> When a person adopts the legal profession, and assumes to exercise its duties in behalf of

3. The principle of judgmental immunity, which applies to lawyers, is not the only longstanding doctrine that defers to a professional's good-faith exercise of judgment while using due care. *See, e.g., Paramount Comme'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 45 n.17 (Del. 1994) (explaining business judgment rule); *Gregory v. Kilbride*, 565 S.E.2d 685, 696 (N.C. Ct. App. 2002) (discussing statutory immunity for physicians in the exercise of professional judgment).

> another for hire, he must be understood as promising to employ a reasonable degree of care and skill in the performance of such duties . . . *but it must not be understood that an attorney is liable for every mistake that may occur in practice, or that he may be held responsible to his client for every error of judgment in the conduct of his client's cause.* Instead of that, the rule is that if he acts with a proper degree of skill, and with reasonable care and to the best of his knowledge, he will not be held responsible.
>
> . . . .
>
> Persons acting professionally in legal formalities, negotiations, or proceedings by the warrant or authority of their clients may be regarded as attorneys-at-law within the meaning of that designation as used in this country; and all such, when they undertake to conduct legal controversies or transactions, profess themselves to be reasonably well acquainted with the law and the rules and practice of the courts, and they are bound to exercise in such proceedings a reasonable degree of care, prudence, diligence, and skill. Authorities everywhere support that proposition; *but attorneys do not profess to know all the law or to be incapable of error or mistake in applying it to the facts of every case, as even the most skillful of the profession would hardly be able to come up to that standard.*

100 U.S. 195, 198-200 (1879) (emphasis added).

This rule has been applied consistently across the country since its inception. *See* Mallen & Smith, *supra*, at 1226 & n.4 (citing four pages of appellate decisions from across the country). The judgmental immunity defense is based on two predicates: (1) the status of the legal proposition being unsettled and (2) that the lawyer acted upon informed judgment. *Id.* at 1226, 1230. In that context, an error in predicting the resolution of unsettled law must not result in legal liability:

> An attorney who acts in good faith and in an honest belief that his advice and acts are well founded and in the best interest of his client is not answerable for a mere error of judgment or for a mistake in a point of law which has not been settled by the court of last resort in his State and on which reasonable doubt may be entertained by well-informed lawyers.

Hodges v. Carter, 80 S.E.2d 144, 146 (N.C. 1954).

In *Crosby v. Jones*, the Florida Supreme Court noted that good faith tactical decisions or decisions made on a fairly debatable point of law are generally not actionable under the rule of judgmental immunity, noting that the rule is premised on the understanding that an attorney who acts in good faith and makes a diligent inquiry into an area of law should not be held liable for providing advice or taking action in an unsettled area of law. 705 So. 2d 1356, 1359 (Fla. 1998); *see also Davis v. Damrell*, 174 Cal. Rptr. 257, 260-61 (Ct. App. 1981) ("[T]he failure to anticipate correctly the resolution of an unsettled legal principle does not

constitute culpable conduct. . . . In short, the exercise of sound professional judgment rests upon consideration of legal perception and not prescience.").

Note the anomalous and counter-intuitive result that would follow from the position argued by Petitioner: a lawyer could be held liable in damages to a non-client under the FDCPA for an error in exercising legal judgment even though *the lawyer's own client* would not have a claim against the attorney based on the same exercise of legal judgment. That is yet another reason supporting affirmance here.

Petitioner and amicus United States suggest that simple "ignorance of the law" is involved here. (Br. of Pet. at 14-15; Br. of United States at 12.) Nonsense. Of course the bona fide error defense does not protect collectors and attorneys who are ignorant of the law – no one has suggested that. Rather, the bona fide error defense only protects those mistakes of law that satisfy the three-prong test in 15 U.S.C. § 1692k(c): when the legal mistake is (1) not intentional and (2) made as a result of a bona fide error, (3) notwithstanding the maintenance of procedures reasonably adapted to avoid any such error. When the error, even if unintentional, is the result of ignorance of the law, the defense is simply not available.

Petitioner and the United States also suggest that a mistake should be deemed "intentional" for purposes of the bona fide error defense if the collector has merely a general intent to collect the debt as opposed to a specific intent to violate the FDCPA. (Br. of Pet. at 20; Br. of United States at 11.) To date, three Circuits have

held directly to the contrary, ruling that a collector need only show that the violation was unintentional, not that the challenged communication itself was unintentional. *See Lewis v. ACB Bus. Servs., Inc.*, 135 F.3d 389, 402 (6th Cir. 1998); *Kort v. Diversified Collection Servs., Inc.*, 394 F.3d 530, 537 (7th Cir. 2005); *Johnson v. Riddle*, 443 F.3d 723, 728-29 (10th Cir. 2006).

That is indeed the better view. As the Tenth Circuit persuasively noted in *Johnson*, the text of § 1692k(c) itself plainly speaks of "the violation" being unintentional, not "the conduct." 443 F.3d at 728-29; *see also* S. Rep. No. 95-382, at 5 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1700 ("A debt collector has no liability, however, if he violates the act in any manner, including with regard to the act's coverage, *when such a violation is unintentional* and occurred despite procedures designed to avoid such violations" (emphasis added)); *see also Caputo v. Prof'l Recovery Servs., Inc.*, 261 F. Supp. 2d 1249, 1255 (D. Kan. 2005) (recognizing that both the language of the FDCPA and the legislative history are more consistent with a specific intent requirement); *see also* Br. of Resp. at 43-44.

Petitioner next contends that the second prong of 15 U.S.C. § 1692k(c) – "maintenance of procedures reasonably adapted to avoid any such error" – cannot reasonably be applied to mistakes of law because the phrase would be "linguistically awkward" if used in that context, and that it would be "difficult to develop standards for what constitutes reasonable procedures." (Br. of Pet. at 10.) Yet every day in law firms across this country, there are ethics partners, risk avoidance partners, compliance officers, professional development

partners, and law firm general counsel who are directly responsible for devising procedures reasonably adapted to avoid legal error by their firm's lawyers. Such procedures include repeated and timely training on developments in specific areas of the law. Compliance with state mandatory continuing legal education requirements is another "procedure reasonably adapted to avoid" mistakes of law.

Several decisions have discussed various procedures that can effectively be maintained to avoid legal errors in the FDCPA context:

> The defendants have offered unrebutted evidence of the procedures they followed when preparing to file suit to collect a debt to avoid errors and omissions that could result in an FDCPA violation. These include the publication of an in-house fair debt compliance manual, updated regularly and supplied to each firm employee; training seminars for firm employees collecting consumer debts; and an eight-step, highly detailed pre-litigation review process to ensure accuracy and to review the work of firm employees to avoid violating the Act. After suit is filed, the firm assigns an attorney to review all issues relating to a particular deficiency, and stops all collection efforts on a disputed balance before judgment to verify all disputed items with the client.

Jenkins v. Heintz, 124 F.3d 824, 834 (7th Cir. 1997); *see also Kort*, 394 F.3d at 538 (holding reasonable

procedure to avoid misinterpreting and misapplying a federal statute is to adopt the legal interpretation of the federal agency charged with regulating under the statute in question); *Taylor v. Luper, Sheriff & Niedenthal Co.*, 74 F. Supp. 2d 761, 766 (S.D. Ohio 1999) (ruling that regular attendance at seminars regarding FDCPA and receiving and reviewing newsletters regarding the Act held sufficient to satisfy defendant's burden of proof on "procedures reasonably adapted" prong).

Here, Respondent law firm designated its senior principal as the person responsible for FDCPA compliance, and he in turn regularly attended conferences and seminars on changes to the FDCPA and subscribed to and routinely consulted periodicals that update counsel on the numerous issues that arise under the Act. The senior principal was charged with instructing other lawyers in the firm on updates and changes to the FDCPA and its attendant case law. (See generally Br. of Resp. at 1-2.) Maintaining procedures reasonably adapted to avoid legal errors is a commonplace feature of practicing law in this country and is an effective method of reducing the risk of mistakes of law.

Petitioner also raises federalism issues, claiming that if the federal courts were to begin deciding whether particular procedures are reasonably adapted to avoid mistakes of law, the courts would become enmeshed in the traditional state function of regulating the practice of law and setting standards for professional conduct. (Br. of Pet. at 27.) However, the states have already adopted uniform standards for the practice of law – the

rule of judgmental immunity. It is rather Petitioner's position – that the federal FDCPA was intended to overrule that ancient common law rule – that threatens principles of federalism.

Petitioner maintains that if the bona fide error defense applied to mistakes of law, it would "encourage debt collectors to take an aggressive view of the law when its requirements are not clear, knowing that there will be no liability." (Br. of Pet. at 11, 31.) This grossly distorts what ACA and its collector and attorney members strive to do on a daily basis. Where the law is genuinely unsettled, there is nothing "aggressive" about adopting the interpretation that favors the client's interest. Indeed, Petitioner's view – that a lawyer in that situation must select the least "aggressive" interpretation – has the potential to chill zealous advocacy within the bounds of the law, and could well place the lawyer in a conflict situation. For example, under Petitioner's view, a lawyer would be well counseled *not* to advance a reasonable argument for changing or extending existing law on behalf of a client because he or she may face *personal* liability under the FDCPA because the law is unsettled. That is the opposite of zealous advocacy. *See Taylor*, 74 F. Supp. 2d at 764 (noting that an "irreconcilable ethical dilemma" would be presented if a lawyer who in good faith asserts a claim in litigation on behalf of her client could be held personally liable under the FDCPA).

Similarly, Petitioner's argument that collectors and lawyers who take an "aggressive view" would have a competitive advantage is unpersuasive. To suggest that collectors and lawyers who carefully analyze uncertain

and unsettled law and exercise their professional judgment in deciding how to proceed somehow have a competitive advantage over others who ignore such legal developments would turn the bona fide error defense on its head. The defense *was* specifically intended to protect lawyers and collectors who are trying to do the right thing.

Finally, Petitioner's claim that affirmance of the decision below will undermine the private enforcement efforts under the FDCPA that Congress intended to deter improper collection practices is misplaced. (Br. of Pet. at 33.) Petitioner raises the concern that rebutting a mistake-of-law defense could be costly and might dissuade plaintiffs from pursuing meritorious claims. But Congress saw it differently when it enacted the FDCPA. Congress chose to include a bona fide error defense precisely to afford collectors a limited defense in this scenario. Hence, pursuit of a case that ultimately is defeated via proof of a bona fide error, is precisely how Congress saw this as playing out. While the FDCPA does, in many respects, favor of the consumer, in this instance Congress chose to afford a defense to level the playing field.

CONCLUSION

For the reasons set forth above, the judgment of the United States Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No 08-1200

In the

Supreme Court of the United States

KAREN L. JERMAN,

Petitioner,

v.

CARLISLE, McNELLIE, RINI, KRAMER & ULRICH, L.P.A. and ADRIENNE S. FOSTER,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF AMERICAN LEGAL AND FINANCIAL NETWORK (AFN) AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE [1]

The American Legal and Financial Network, (the "AFN") is a national not for profit corporation whose membership consists of attorneys and other professionals representing residential mortgage banking institutions and loan servicers across the United States. The AFN's mission is to serve the legal and residential mortgage banking industry through leadership, education and professional development. The AFN seeks to educate its members, and others in our industry, on the laws, rules and regulations which impact creditor's rights.

This organization actively encourages responsible and appropriate legislation affecting actions to collect sums owed under residential mortgage loans in default. Since the AFN's members engage in consumer debt collection, their actions are regulated by the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 *et seq.* (FDCPA), as well as numerous other federal and state statutes. Accordingly, the AFN and its membership have a substantial interest in the outcome of the decision of this Court.

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[1] Pursuant to Rule 37.6, *amicus curiae* certify that no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than amicus, its members or its counsel make a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

SUMMARY OF ARGUMENT

Both the FDCPA and the Truth in Lending Act (TILA) authorize a defense based on a bona fide error. However, TILA expressly provides that a bona fide error does not include an error of legal judgment. This exclusion does not appear in the FDCPA and may not be added to the FDCPA by the courts. In essence, the petitioner seeks to impose liability on debt collectors by asking this Court to graft provisions of TILA on to the FDCPA.

An increasing number of courts have reviewed this issue and concluded that a bona fide error under the FDCPA, may include a mistake of law.

The petitioner argues that ignorance of the law is rarely a defense. This argument mischaracterizes the bona fide error defense. The cliché, ignorance of the law is not an excuse, has no applicability.

The bona fide error defense also requires that the error occurred despite the maintenance of procedures reasonably adapted to avoid any such error. The respondents amply demonstrated sufficient procedures designed to avoid such errors.

ARGUMENT

I. AN INCREASING NUMBER OF CASES HAVE CONCLUDED THAT THE BONA FIDE ERROR DEFENSE, UNDER THE FDCPA, INCLUDES MISTAKES OF LAW

In earlier decisions, some courts held that the bona fide error defense did not include mistakes of law. *See* e.g., *Pipiles v. Credit Bureau of Lockport, Inc.*, 886 F.2d 22 (2nd Cir 1989); *Baker v. G.C. Servs. Corp.*, 677 F.2d 775 (9th Cir. 1982). However, the growing trend is to find that a mistake of law can qualify as a bona fide error. *See Nielsen v. Dickerson*, 307 F.3d 623, 641 (7th Cir. 2002).

Jerman v. Carlisle, 502 F. Supp. 2d 686 at 694 (N.D. Ohio, 2007) is typical of this trend. The court stated:

> Unlike TILA, the plain language of the FDCPA suggests no intent to limit the bona fide error defense to clerical errors. To the contrary, § 1692k(c) refers by its terms to any 'error' that is 'bona fide.' We find no indication in the legislative history that Congress intended this broad language to mean anything other than what it says.

See also *Hartman v. Great Seneca Financial Corp.*, 569 F.3d 606 (6th Cir. 2009); *Miller v. Javitch, Blockand Rathbone*, 561 F.3d 588 (6th Cir. 2009); *Johnson v. Riddle* (Johnson II) 443 F.3d 723 (10th Cir. 2006) (applying bona fide error defense to mistakes of law); *Johnson v. Riddle*, (Johnson I) 305 F.3d 1107 (10th Cir. 2002) (same); *Castro v. Collecto*,

Inc., NO. EP-08-CA-215-FM. 2009 WL 3617557 (W.D. Texas, October 27, 2009) (applying bona fide error defense to mistakes of law); *Gausser v. Porfolio Recovery Associates, LLC*, 593 F. Supp. 2d 1297 (S.D. Fla. 2009); *Midland Funding LLC v. Brent*, No. 3:08 CV 1431, 2009 WL 2437243 (N.D. Ohio Aug. 11, 2009). *Brazier v. Law Offices of Mitchell N. Kay*, No. 8:08-cv-156-t-17 MAP, 2009 WL 764161 (M.D. Fla. March 19, 2009); *Pincus v. Law Offices of Erskine and Fleischer*, No.: 8:81357-CIV, 2009, 2009 WL 2244215 (S.D. Fla. July 29, 2009); *McCorriston v. L.W.T., Inc.*, 536 F. Supp 2d 1268 (M.D. Fla. 2008); *Pescatrice v. Orovitz*, 539 F. Supp. 2d 1375 (S.D. Fla. 2008); *Lee v. Javitch, Block & Rathbone, LLP*, No. 1:06-CV-585, 2007 WL 4591961 (Dec. 28, 2007); *Kelly v. Great Seneca Financial Corp.*, 443 F. Supp. 2d 954 (S.D. Ohio 2005); *Delawder v. Platinum Fin. Serv. Corp.*, 443 F. Supp. 2d 942 (S.D. Ohio 2005); *Rosado v. Taylor* , 324 F. Supp. 2d 917 (N.D. Ind. 2004) (FDCPA should not be compared to TILA because it does not contain the same language); *Frye v. Bowman, Heintz, Boscia, Vician, P.C.*, 193 F. Supp. 2d 1070 (S. D. Ind. 2002) (TILA provisions concerning bona fide error defense do not apply to FDCPA analysis); *Filsinger v. Upton, Cohen & Slamowitz*, No. 99-CV-1393, 2000 WL 19822 (N.D.N.Y. Feb. 18, 2000) (nothing in plain language limits the defense to clerical errors); *Countryman v. Solomon and Solomon*, No. 99-CV-1548, 2000 WL 156837 (W.D.N.Y. February 8, 2000)(same); *Pollice v. National Tax Funding, L.P.*, 59 F. Supp. 2d 474 (W.D. Pa. 1999) (overruled in part on other grounds) ; *Watkins v. Peterson Ent.*, 57 F. Supp. 2d 1102 (E.D. Wash. 1999) (debt collector's mistake of law

arose from an official interpretation of state law, to which the court applied the bona fide error defense); *Aronson v. Commercial Financial Services, Inc.*, No. CIV. A 96-2113, 1997 WL 1038818 (W.D. Pa. December 22, 1997) (violation of FDCPA was mistake of law that was not intentional and resulted from bona fide error).

In *Johnson I*, 305 F.3d 1107 (10th Cir. 2002), the Tenth Circuit engaged in extensive analysis of this issue and held that, unlike TILA, the plain language of the FDCPA suggests no intent to limit the bona fide error defense to clerical errors. The *Johnson* court also noted that, if mistakes of law were not protected by the bona fide error defense, ethical duties of zealous advocacy could result in debt collecting lawyers asserting claims that would expose them to FDCPA liability. Specifically, the court recognized that debt collectors are susceptible of making mistakes of law to which the bona fide error defense might apply. The *Johnson* court acknowledged that it is more common to speak of procedures adapted to avoid clerical errors than to speak of procedures adopted to avoid mistakes of law. However, the court found, "absent a clearer indication that Congress meant to limit the defense to clerical errors," it would "instead adhere to the unambiguous language of the statute as supported by the available legislative history." *Id.*

A. THE AUTHORITIES HOLDING THAT THE BONA FIDE ERROR DEFENSE INCLUDES MISTAKES OF LAW ARE FOUNDED ON PRECEDENT, CONGRESSIONAL INTENT AND SOUND PUBLIC POLICY.

The recent decisions reflect a more refined understanding of Congressional intent and the distinction between the provisions of the FDCPA and TILA. Examples of this thoughtful analysis of Congressional intent are found in *Johnson v. Riddle* (Johnson I) 305 F. 3d 1107 (10th Cir. 2002); *Jerman v. Carlisle*, 502 F. Supp. 2d 695 (N.D. Ohio, 2007); *Rosado v. Taylor*, 324 F. Supp. 2d 917, 932 (N.D. Ind. 2004); *Frye v. Bowman, Heintz, Boscia, Vician, P.C*, 193 F. Supp. 2d 1070 (S. D. Ind 2002); *Aronson v. Commercial Financial Services, Inc.*, No. CIV. A. 96 2113, 1997 WL 1038818 (W.D. Pa Dec. 22, 1997) at *4. Some of these decisions focus strongly on the fact that denying debt collectors the opportunity to raise the bona fide error defense places them in an untenable position. They include *Johnson v. Riddle* (Johnson I) 305 F 3d 1107 (10th Cir. 2002); *Taylor v. Luper, Sheriff and Niedenthal Co. LPA*, 74 F Supp. 2d 761 (S.D. Ohio 1999); and *Watkins v. Peterson Ent.*, 57 F. Supp. 2d 1102, 1107-8 (E.D. Wash. 1999).

To the extent there is any disagreement in the courts, it is because the courts are wrestling with conflicting interests. It is recognized that consumers should be protected from abusive debt collection practices. On the other hand, debt collectors, including attorneys, have an ethical obligation to zealously represent the interests of their client. The

petitioner seems to be concerned that if the bona fide error defense includes mistakes of law, then unscrupulous debt collectors will be shielded from liability by assertion of this defense.

Debt collectors are held to an objective standard of reasonableness, which means that they still have the burden to plead and prove this affirmative defense. *Johnson v. Riddle* (Johnson I), 305 F.3d 1107 (10th Cir. 2002). Thus, even courts recognizing the defense for mistakes of law will find some debt collectors liable on the facts of those particular cases. As early as 1895, in *Davis v. Wakelee*, 156 U.S. 680 (1895), this Court recognized that it is insufficient for a litigant to avoid liability through the mere assertion of a bona fide mistake of law; instead, the court looks to the evidence, including the conduct of the litigant asserting the defense, to decide whether the mistake was really "bona fide." In this particular context, the Sixth Circuit in both *Hartman v. Great Seneca Financial Corp.*, 569 F.3d 606 (6th Cir. 2009) and *Midland Funding LLC v. Brent*, No. 3:08 CV 1434, 2009 WL 2437243 (N.D. Ohio Aug. 11, 2009) recognized that the bona fide error defense applies to mistakes of law. Nevertheless, in both cases the court found the defendant debt collectors' evidence of their procedures inadequate to qualify for the defense. In *Miller v. Javitch, Block and Rathbone*, 561 F.3d 588 (6th Cir. 2009) the Sixth Circuit recognized the defense could apply on the facts of the particular case before it—but did not find that it necessarily applied or that the mere assertion of the defense precluded liability. In the same case, at the trial court level, the Southern District of Ohio

painstakingly examined the motive and conduct of the debt collector in deciding that its conduct supported the bona fide error defense. *Miller*, 534 F. Supp. 2d at 772. *Ruth v. Triumph Partnerships*, 577 F 3d 790 (N.D. Ill. 2009), is a Seventh Circuit opinion in which the court declined to decide whether or not the bona fide error defense applies to mistakes of law, but found that the defense would not help the debt collector in that its conduct in relying on advice in a pamphlet published by the Debt Buyers Association was not "reasonably adapted to prevent legal error." Thus, the availability of the bona fide error defense for mistakes of law will not automatically relieve debt collectors of liability under the FDCPA.

Debt collectors are being forced to interpret a statute that is both unclear in many respects and interpreted in a variety of ways by courts across the country. As the *Jerman* court below acknowledged in a gross understatement concerning this issue, the case law interpreting the FDCPA is "not settled" and the statute "not unambiguous." *Jerman*, 502 F. Supp. 2d at 686. Debt collectors must implement procedures that affect hundreds or thousands of debtors, based upon a hope that the courts will interpret the law in the same manner. They are subject to the crushing burden and expense of class actions whenever debtor's counsel interpret the law differently. They are forced to wait years for judicial determinations, without knowing if their interpretation is correct. If this case is decided as petitioner posits, they would be subjected to strict liability in the event they are wrong about their interpretation of the law.

A debt collector has a substantial burden to establish that its mistake of law resulted from a bona fide error, that it was not intentional, and that it had procedures reasonably adapted to avoid the error. If the debt collector satisfies its burden, the debt collector should not be held liable, as intended by Congress.

II. THE RESPONDENTS DO NOT CLAIM THAT IGNORANCE OF THE LAW IS A DEFENSE TO VIOLATION OF THE FDCPA

The principle cited by petitioner, and its supporters, that "ignorance of the law is no excuse" is not relevant in determining the applicability of the bona fide error defense. The bona fide error defense requires a finding, *inter alia*, that the error was "not intentional." However, "not intentional" cannot be equated with "ignorance." Webster's dictionary defines "ignorance" as "lack of knowledge, education, or awareness". "Intentional", as stated in the brief of the United States, means an act foreseen and desired by the actor. Petitioner does not even attempt to define the term "intentional" but merely tries to equate it with terms like "knowledge" or "willfulness".

Ignorance implies a complete lack of knowledge of the law. For example, a defendant's ignorance of the time to bring a habeas petition did not excuse a late filing. *See e.g. Marsh v. Soares*, 223 F.3d 1217 (10th Cir. 2000). In the criminal context, the possession of substances which endanger the public welfare but whose illegal character was

unknown to the defendant was not a defense to criminal prosecution. *See Staples v. United States*, 511 U.S. 600 (1994).

By contrast, an intentional violation of the law requires the defendant to act deliberately to violate the law. For example, in *Johnson v. Riddle*, 443 F.3d 723, 728 (2006), the court held that a violation was unintentional for purposes of the FDCPA's bona fide error defense if the debt collector could establish the lack of specific intent to violate the FDCPA. *See also Nielsen v. Dickerson*, 307 F.3d 623, 641 (7th Cir. 2002) finding that a debt collector may avail itself of the bona fide error defense because it had no intent to violate the FDCPA, although its actions were deliberate.

The petitioner cites *Bueno v. Mattner*, 829 F.2d 1380 (6th Cir. 1987), for the proposition that defendants can be found to have intentionally violated the law even where they were ignorant of its terms. This case is readily distinguishable. In *Bueno*, the defendants admittedly failed to comply with disclosure provisions of the Migrant and Seasonal Agricultural Worker Protection Act. The defendants argued that since they were unaware of the existence of this Act, their lack of knowledge precluded a finding that they intentionally violated this Act. The court rejected the claim that a defendant may not be liable where a defendant was unaware of the existence or applicability of the statute. Such a scenario has no bearing on the determination to be made in the matter at bar. The respondents do not claim to have been unaware of the existence of the FDCPA. Moreover, *Bueno* is further distinguishable because the statute at issue

in that case did not provide a defense based on a bona fide error.

The petitioner's contention that the respondents' conduct was "intentional" is contradicted by the very language of the statute. Congress drafted the FDCPA so as to provide a debt collector with a defense where the "*violation* was not intentional". It would be illogical to conclude that the term "violation" in the statute refers to some form of conduct. The term "violation" must refer to a violation of the FDCPA. Indeed, the cases cited by petitioner and the United States involving the violation of criminal statutes all addressed the level of intent necessary to convict under the respective statutes. Each of these cases held that the defendant had to have knowledge that its actions were illegal. *See Bryan v. United States*, 524 U.S. 184 (1998). *Ratzlaf v. United States*, 510 U.S. 135 (1994) and *Staples v. United States*, 511 U.S. 600 (1994).

The issue presented in both of the FDCPA cases cited by the petitioner, *Johnson v. Riddle*, 443 F.3d 723 (10th Cir. 2006) and *Kort v. Diversified Collection Services*, 394 F.3d 530 (7th Cir. 2004) was not whether the debt collector was ignorant of the law, but whether the debt collector erred in applying the law. Although the petitioner seeks to distinguish *Kort*, its reasoning is sound. In *Kort*, the recipient of a student loan contended that a garnishment notice violated the FDCPA. The debt collector asserted the bona fide error defense stating that the text in the garnishment notice was taken word for word from a form issued by the Department of Education. The court found that by following this form, the debt

collector did not intentionally violate the FDCPA.

Indeed, petitioner does not provide a single example where Congress' use of "intentional violation" is limited solely to the act committed regardless of the individual's knowledge of the law. Rather, petitioner focuses on Congress' usage of the word "knowing," even though this word is not contained in 15 U.S.C § 1692k. Petitioner argues that when Congress employs the word "knowing" in conjunction with "violation," it is referring to "factual knowledge as distinguished from knowledge of the law." *See* Petitioner's Brief at p. 18 (citing *Bryan v. United States*, 524 U.S. 184, 192 (1998). However, when Congress intends that a defendant's knowledge or reckless disregard of the law is to be considered, it commonly uses the term "knowingly" or "willfully". *See Safeco Ins. Co. of Am v. Burr*, 551 U.S. 47, 57 (2007).

III. THE RESPONDENTS MAINTAINED PROCEDURES WHICH WERE REASONABLY ADAPTED TO AVOID BONA FIDE ERROR

A. The Bona Fide Error And Safe Harbor Defenses Are Not Mutually Exclusive

The FDCPA allows debt collectors to obtain clarification of any ambiguities or uncertainties in the statute by seeking advisory opinions from the Federal Trade Commission (FTC). *See* 15 U.S.C. § 1692k(e). The petitioner, along with the United States, as amicus curiae, contend that the FTC's role would be diminished or usurped if debt

collectors relied on their own procedures to avoid legal errors. Petitioner's concerns are unfounded. Her argument rests on the assumption that many debt collectors will manipulate or circumvent the FDCPA's requirements and avoid liability by exploiting the bona fide error defense. Congress has built in enough protection in the FDCPA to guard against abuse by such unethical collectors. Unscrupulous debt collectors will not be afforded refuge under the bona fide error defense.

The rigorous requirements of the bona fide error defense adequately protect against manipulation of the FDCPA. A mere showing by a debt collector that there was no clear precedent prohibiting its actions is insufficient to satisfy the defense, as held by the Tenth Circuit's ruling in *Johnson v. Riddle*, 443 F.3d 723 (10th Cir. 2006). As with other legal issues, the courts are well-positioned to determine whether a debt collector's efforts "amount to genuine precautions or are purely self-serving." *See Richburg v. Palisades*, 247 F.R.D. 457, 468 (E.D. Pa. 2008). Moreover, it is in the debt collector's best interests to ensure that its compliance efforts are genuine and comprehensive because an incorrect interpretation of the statute when coupled with self-serving procedures could result in the imposition of costly statutory penalties.

The fact that Congress has provided an avenue through which statutory ambiguities may be resolved does not aid the petitioner's position. Numerous other federal statutes contain similar provisions endowing governmental agencies with the requisite authority to interpret a federal statute. For example, Congress allows taxpayers to seek

formal guidance from the Internal Revenue Service (IRS) pursuant to private letter rulings. These private letter rulings are written statements issued to the requesting taxpayer and interpret and apply the tax laws to the taxpayer's specific fact pattern. Nonetheless, taxpayers are not required to seek private letter rulings from the IRS, and they may, in fact, rely on their own understanding of the tax laws without being subject to penalties under Section 6694 of the Internal Revenue Code of 1986, as amended, as long as there is "substantial authority" for their position *See* 26 U.S.C. § 6694. Like the Internal Revenue Code, the FDCPA sets forth a mechanism through which ambiguities may be resolved, but it is unlikely that Congress intended this to be the only manner by which interpretations of the FDCPA can be made without fear of statutory penalties. In both statutes, Congress has provided affirmative defenses – in the Internal Revenue Code under the guise of the "substantial authority" standard, and in the FDCPA under the guise of the bona fide error defense. As the Code demonstrates, there is no incongruity with Congress establishing different procedures through which the public may resolve statutory uncertainties.

B. What Procedures, To Avoid A Bona Fide Error, Will be Considered Sufficient?

Petitioner contends that the circuit courts are deeply divided as to the procedures that will be considered sufficient to satisfy the bona fide error defense. A review of recent case law shows a

consensus that law firm debt collectors need to have a review by an attorney well-informed of the FDCPA's requirements in order for their procedures to qualify as "reasonably adapted to prevent the error." The respondents herein satisfied this standard. For non-law firm debt collectors, courts appear to be in agreement that they should seek the opinion of either an attorney, well versed in FDCPA's requirements, or a governmental agency.

1. The Tenth Circuit Court of Appeals

In *Johnson v. Riddle*, 443 F.3d 723 (10th Cir. 2006), the debt collector characterized a dishonored check claim as a shoplifting charge, which allowed it to recover a higher statutory penalty. The debt collector's lawsuit against the plaintiff was ultimately dismissed, but the plaintiff filed a class action lawsuit against the debt collector, claiming that "the practice of bringing shoplifting charges against the maker of a dishonored check violated the FDCPA." *Johnson*, 443 F.3d at 725. The debt collector argued that it had employed two procedures aimed at avoiding legal error. First, the debt collector had previously researched whether the state permitted the practice of claiming shoplifting penalties for a dishonored check and had come to the qualified conclusion that state law was silent on the issue. *Id.* at 730. Second, the debt collector had filed a "test case," which resulted in a default judgment and an unpublished opinion awarding statutory shoplifting penalties. *Id.* The Tenth Circuit ruled that these procedures were "conceivably sufficient" to satisfy the bona fide error requirement, but it reversed the district court's order granting summary

judgment in favor of the debt collector because there remained issues of triable fact. *Id.* at 731.

2. The Seventh Circuit Court of Appeals

In *Seeger v. AFNI, Inc.*, 548 F.3d 1107 (7th Cir. 2008), the Seventh Circuit reviewed whether a debt collector's practice of including a separate collection fee in its letters to debtors violated both Wisconsin law and the FDCPA. *Id.* at 1110. The debt collector invoked the bona fide error defense and as proof of its reasonable procedures to prevent violation of the FDCPA, pointed to its creation of a compliance committee that "review[ed] legal summaries prepared by the American Creditor Association (ACA) and the Debt Bar Association." *Id.* at 1114. The debt collector also alleged that it had submitted its forms to the ACA and that one of its employees "regularly read excerpts of the relevant Wisconsin statutes." *Id.* The Seventh Circuit held that these procedures were not reasonable because the debt collector had attempted to keep itself informed only through its trade association communications. *Id.*

In *Ruth v. Triumph Partnership*, 577 F.3d 790 (7th Cir. 2009), the Seventh Circuit articulated a more precise standard as to what procedures would be considered reasonable. *Ruth* concerned a notice letter that was sent by a debt collector to numerous consumers informing them that the debt collector, by law, "could disclose certain nonpublic information about the debtor without the debtor's permission and would do so unless the debtor expressly opted out." *Id.* at 794. The plaintiffs argued that these

statements were false and in violation of the FDCPA. *Id.* In addressing the debt collector's bona fide error defense, the Seventh Circuit stated that if a bona fide error defense is available at all for legal errors, it is only available to debt collectors "who can establish that they reasonably relied on either (1) the legal opinion of an attorney who has conducted the appropriate legal research, or (2) the opinion of another person or organization with expertise in the relevant area of law - for example, the appropriate governmental agency." *Id.* at 804. In *Ruth*, the debt collector's procedures were insufficient to qualify for the defense because the debt collector did not provide any evidence that it "ever sought legal or regulatory advice as to whether the collection letter and notice were in compliance with the FDCPA." *Id.* at 805.

3. Pennsylvania District Court

In *Richburg v. Palisades Collection, LLC*, 247 F.R.D. 457, 468 (E.D. Pa. 2008), the debt collector initiated a debt collection action against the plaintiff approximately five and a half years after the plaintiff's debt went into default. *Id.* at 461. The plaintiff subsequently filed a class action lawsuit seeking determination of whether a four or six year statute of limitations applies to debt collection actions on consumer debt. *Id.* at 462. In determining whether the debt collector is entitled to the bona fide error defense, the district court reviewed the debt collector's procedures, which included the creation of "a nationwide survey of statutes of limitation to aid attorneys in determining the applicable law." *Id.* at 467. The court noted that the debt collector had not

adopted a regulator or third party interpretation of the law that would permit the court to find that the survey constitutes a reasonable procedure as a matter of law. *Id.* at 468. Because the debt collector relied on its own interpretation and efforts in generating the survey, the court held that a reasonable jury could find the debt collector's measures were insufficient. *Id.*

4. Indiana District Court

In *Frye v. Bowman*, 193 F.Supp.2d 1070 (S.D. Ind. 2002), a law firm debt collector filed suit to collect a debt owed by the plaintiffs. The summons stated that the plaintiffs' answer was due twenty-three days from the date of "receipt," as opposed to the correct twenty-three days from the date of service. The plaintiffs contended that the misstatement constituted a violation of the FDCPA because it was a false, deceptive or misleading representation in connection with the collection of a debt. *Id.* at 1078. The debt collector argued that it was entitled to the bona fide error defense and that its summons was "similar if not identical to that used in summons forms issued by a large number of clerks of state courts in Indiana." *Id.* at 1086.

The district court found that the debt collector had established the following procedures to protect against the error: (1) the debt collector published an "in-house" Fair Debt compliance manual, updated on a regular basis and supplied to every attorney, paralegal, collector and employee of the firm who dealt with the direct collection of consumer loan accounts; and (2) the debt collector provided in-house training seminars to specifically inform paralegals,

collectors, and other staff persons working on the collection of consumer debt accounts as to information to ensure compliance with the FDCPA and any recent developments thereunder. *Id.* at 1076. The district court further noted that the debt collector maintained specific procedures to ensure use of the correct summons forms, which included: (1) an attorney, paralegal or staff person selecting a summons form from the firm computer system; and (2) an attorney reviewing the complete collection file, including the specific summons form to be filed against a consumer debtor, to ensure that the correct form was used. *Id.* Emphasizing that the FDCPA does not require procedures to be "fool proof," but rather reasonably adapted to avoid such errors, the district court granted the debt collector's motion for summary judgment, concluding that its procedures were reasonable to avoid the errors in the summons claimed by the plaintiffs. *Id.* at 1089.

All of these cases point in the direction of debt collectors seeking the advice of knowledgeable counsel and having documented, extensive procedures in place to show that the debt collectors genuinely attempted to establish procedures aimed at preventing the mistake of law. When compared against this newly emerging case law, it is evident that the respondents' procedures are more than sufficient.

To ensure compliance with the FDCPA and its "ever-changing" body of law: (a) the respondent designated its senior principal as the individual responsible for compliance with the FDCPA; (b) this compliance officer regularly attended conferences and seminars that focused on FDCPA issues; (c) the

respondent subscribed to "Fair Debt Collection," a part of the "The Consumer Credit and Legal Practices Series," together with the supplements thereto; (d) the compliance officer regularly distributed copies of cases relevant to the firm's practices and procedures to all attorneys at the firm; (e) all new employees, attorneys and non-attorneys, were advised of the respondent's obligations under the FDCPA, provided with the FDCPA Procedures Manual, and encouraged to seek the compliance officer's advice with questions regarding the FDCPA; and (f) the compliance officer conducted mandatory meetings at least twice a year for all available employees wherein FDCPA issues and developments were discussed. *Id.* at 477.

In none of the above-cited cases did the debt collector follow more than a few of these procedures, but in the present case, the Sixth Circuit found that the respondent had followed all six, which the court found to be sufficient to avoid an error of law. Unlike the debt collectors in *Ruth* and *Richburg*, the respondent did not merely rely on its own interpretation of the statute; rather, the respondent's compliance officer actively sought the insight of third parties, as is evident by the officer's attendance of various FDCPA conferences and seminars and the respondent's subscription to informative news sources, such as "Fair Debt Collection." *See id.* When viewed in the aggregate, the respondent's procedures are thorough and create an open and informed environment wherein all employees were able to address any concerns or issues arising under the FDCPA. The Sixth Circuit specifically cited with approval these actions in

affirming the district court's ruling. Further, the petitioner has presented no evidence that the respondent's extensive efforts in researching the issue and enacting policies in accordance with the statute's requirements were "self-serving" or fraudulent. A careful review of the facts reveals that the respondents were cognizant of the consequences of noncompliance and that they undertook their research and investigatory efforts earnestly to ensure proper compliance.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 08-1200

In The
Supreme Court of the United States

KAREN L. JERMAN,

Petitioner,

v.

CARLISLE, MCNELLIE, RINI, KRAMER & ULRICH, LPA AND ADRIENNE FOSTER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF USFN - AMERICA'S MORTGAGE BANKING ATTORNEYS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

USFN – America's Mortgage Banking Attorneys ("USFN") is a national, not-for-profit association of law firms and trustee companies that specialize in real estate finance matters. Founded in 1988, the USFN consists of organizations that represent the nation's largest mortgage, and mortgage servicing, companies in matters related to foreclosure, bankruptcy, loan modifications, inventoried properties, and litigation related to these areas. Membership also includes industry-affiliated suppliers of products and services.

USFN was established to promote competent, professional, and ethical representation among its membership and for the mortgage servicing industry, and to represent the collective interests of its membership to the mortgage servicing industry. As part of its mission, USFN also supports the interests of its members and the mortgage servicing industry through education, political and governmental reform, and through the encouragement of industry standard procedures, technologies, and best practices.

Among the services and products offered to the industry by USFN are industry-focused education seminars, state-by-state desk guides and matrices that address specific industry topics and issues, the National Mortgage Servicer's Reference Directory, which is a one-of-a-kind compendium of industry information, training DVDs, and in-house staff training programs for mortgage companies.[1]

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended

SUMMARY OF THE ARGUMENT

The purpose of the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 *et seq.* ("FDCPA"), is to eliminate abusive debt collection practices – not to punish good faith harmless errors. 15 U.S.C. § 1692(e). In furtherance of that purpose, Congress provided a broad bona fide error defense to the FDCPA. 15 U.S.C. § 1692k(c).

In this case, Petitioner seeks, on her own behalf and on behalf of her putative class, to hold Respondents liable under the FDCPA for an honest, unintentional, technical legal error that caused her no harm. Petitioner is a borrower who is suing her lender's lawyers, not for the foreclosure they filed against her, which was promptly dismissed when Respondents confirmed that Petitioner had paid the loan off, but because Respondents included with their foreclosure complaint a technically defective FDCPA notice. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, LPA*, 538 F.3d 469, 471-472 (6th Cir. 2008). Although Respondents had crafted their notice in keeping with court decisions in their circuit, the courts below held that (1) the notice violated the FDCPA; but (2) as a result of Respondents' reliance on the case law, their violation was an unintentional, bona fide, error committed notwithstanding procedures reasonably adapted to avoid violating the Act. *Id.* at 472, 478. The

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to fund the preparation or submission of this brief. No person other than amicus curiae or its counsel made a monetary contribution to its preparation or submission. Letters reflecting blanket consent of the parties have been filed with the Clerk, and counsel for the parties have received timely notice of the USFN's intent to file a brief amicus curiae.

district court granted the Respondents' motion for summary judgment, and the Sixth Circuit affirmed. *Id.* Petitioner now claims that the FDCPA's bona fide error defense should not apply to good faith errors of law. Excluding good faith legal errors, however, would create an absurd result for debt collector attorneys not contemplated by this Court; would make debt collector attorneys insurers of their clients' claims to the opposing party; would cause a chilling effect on advocacy; and would disadvantage ethical debt collectors.[2] Such a result is contrary to the intent of Congress and against public policy.[3]

The Supreme Court has acknowledged, in *Heintz v. Jenkins*, 514 U.S. 291, 295 (1995), that the bona fide error defense is a necessary protection for debt collector lawyers engaged in litigation. *Id.* at 295. Without the defense for legal errors, debt collector attorneys could be subject to FDCPA liability for representing clients in unsuccessful cases. *Id.* This would create an absurd result. The Supreme Court's

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[2] The notion that the bona fide error defense of the FDCPA applies to legal errors should not be confused with Petitioner's inapposite proposition that the defense should not be available in situations involving "ignorance of the law." Respondents do not seek protection for ignorance of the law. "Ignorance" is the "condition of being uneducated." THE AMERICAN HERITAGE DICTIONARY 873 (4th Ed. 2000). A "bona fide" "error" is a "good faith" or "sincere" "mistake" or "unintentional violation." *Id.*, at 208, 606. The terms are not synonymous. A person may make a good faith mistake but still be educated regarding the status of the law.

[3] Petitioner's position also defies the plain meaning of the FDCPA's bona fide error defense; however, that issue is discussed at length in Respondents' Brief. Resp. Br. 11-30.

analysis is supported by the canons of ethics and civil rules, which provide the bar for ethical advocacy.

The bona fide error defense is a critical balance within the FDPCA to protect ethical debt collectors when the Act provides insufficient guidance. The Act includes only basic statutory guidance, without a viable FTC safe harbor or explanatory regulations. Since 1977 when the FDCPA was enacted, there have been changes in technology that the Act does not specifically address. As a result, debt collectors often have little guidance. If the Court were to narrow the good faith error defense, the number of law suits filed for technical violations would multiply, expanding the cottage industry of professional plaintiffs who sue under the FDCPA.

ARGUMENT

I. AN INTERPRETATION OF THE FDCPA BONA FIDE ERROR DEFENSE THAT EXCLUDES GOOD FAITH ERRORS OF LAW CREATES AN ABSURD AND UNJUST RESULT THAT CONGRESS COULD NOT HAVE INTENDED.

The express purpose of the FDCPA is "to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. § 1692(e). Thus, the FDCPA seeks to punish bad actors while, at the same time, ensuring that debt collectors who do not employ abusive tactics will not be disadvantaged as a result. These express purposes underlying the Act must

inform the interpretation of the bona fide error defense set forth in section 1692k(c). *See, Norfolk Redev. and Housing Authority v. Chesapeake & Potomac Tel. Co. of Va.*, 464 U.S. 30, 36 (1983) ("'As in all cases of statutory construction, our task is to interpret the words of the statute in light of the purposes Congress sought to serve.'" (quoting *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979))); *see also, Beecham v. United States*, 511 U.S. 368, 372 (1994) ("[w]e seek to discern [] the plain meaning of the whole statute, not of isolated sentences.").

The FDCPA's bona fide error defense provides:

> A debt collector may not be held liable in any action brought under this title if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

15 U.S.C. § 1692k(c). Petitioner's proposed interpretation of section 1692k(c), that good faith legal errors are excluded from the bona fide error defense, leads to both absurd and unjust results. Well-settled canons of statutory construction caution against statutory interpretations that "would produce absurd and unjust result[s] which Congress could not have intended." *Clinton v. City of New York*, 524 U.S. 417, 429 (1998) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 574 (1982)).

A. This Court has already acknowledged, in *Heintz v. Jenkins*, that the bona fide error defense is a necessary protection for litigating attorneys to avoid reaching an absurd result.

The Court recognized the absurd result that would occur if the bona fide error defense does not apply to mistakes by litigating attorneys. *Heintz v. Jenkins*, 514 U.S. at 295. In *Heintz,* the Court discussed the interplay between the good faith error defense and attorney liability as follows:

> The [Sixth Circuit] reasoned that, were the Act to apply to litigating activities, this provision automatically would make liable any litigation lawyer who brought, and then lost, a claim against a debtor. But, the Act says explicitly that a "debt collector" may not be held liable if he "shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." *§ 1692k(c). Thus, even if we were to assume that the suggested reading of § 1692e(5) is correct, we would not find the result so absurd as to warrant implying an exemption for litigating lawyers.*

Id. at 295 (emphasis added). The Court, relying heavily on the protection the bona fide error defense would afford to losing debt collector attorneys, declined to carve out a "litigation exception" for them. *Id.* The Court's reasoning, as stated in *Heintz*, is clear: including litigating lawyers as debt collectors under

the FDCPA would be absurd but for the protection of the bona fide error defense.

Petitioner attempts to circumvent the Court's analysis in *Heintz* by insisting that "respondents' collection lawsuit against petitioner failed (or would have failed if they had not dismissed it) not because they misunderstood the law but because they mistakenly believed petitioner was in arrears on her mortgage when, in fact, she had paid it off." Pet. Br. 38. This startling retreat from the basis for her own complaint, which alleges a legal violation of the FDCPA, not a factual error, suggests that Petitioner cannot reconcile her claims here with the Court's rationale in *Heintz*. The bona fide error defense must apply to good faith legal errors to avoid the absurd result that "any litigation lawyer who brought, and then lost, a claim against a debtor" would be automatically liable to that debtor. *Heintz*, 514 U.S. at 295.

B. Eliminating protection for bona fide legal errors would make litigating attorneys insurers of their clients' claims.

Petitioner's interpretation of the bona fide error defense would elevate the standard of care that debt collector attorneys owe to adverse parties far above that owed to their own clients.[4] In the context of a legal malpractice action, the duty of care an attorney owes to her client is measured by negligence

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[4] This argument also applies to non-attorney debt collectors to the extent that they have a duty to the creditors they represent to maximize recovery of the amount owed.

standards. 7 AM. JUR. 2D *Attorneys at Law* § 201 (2008). When an attorney makes a legal argument that is rejected by a court, that attorney ordinarily will not face liability exposure to a client for legal malpractice. Under Petitioner's view, debt collector attorneys become absolute insurers of their clients' claims to collect debts, even in situations where those claims involve good faith legal arguments.

For example, if a debt collector attorney includes in a client's debt a fee or charge that the attorney believes in good faith may be recovered from a debtor under a contract, and ultimately a court finds that the fee or charge is prohibited, then the debtor has a cause of action under the FDCPA – not against the creditor – but against the creditor's attorney! Moreover, under Petitioner's reading of the bona fide error defense, the debt collector attorney would have no defense to the FDCPA claim for the good faith error. As a result, the attorney could be liable under the FDCPA to the debtor for the debtor's attorney fees, costs, actual damages, and statutory damages related to the charge. The creditor's attorney would be acting as an insurer to the debtor for the claims made by his client.

Over 125 years ago, this Court recognized the absurdity of holding attorneys to a standard of perfection with respect to their own clients, let alone adverse parties:

> Persons acting professionally in legal formalities, negotiations, or proceedings by the warrant or authority of their clients may be regarded as attorneys-at-law within the meaning of that designation as used in this country; and as such, when they undertake to

> conduct legal controversies or transactions, profess themselves to be reasonably well acquainted with the law and the rules and practice of the courts, and they are bound to exercise in such proceedings a reasonable degree of care, prudence, diligence, and skill. Authorities everywhere support that proposition; but *attorneys do not profess to know all the law or to be incapable of error or mistake in applying it to the facts of every case, as even the most skillful of the profession would hardly be able to come up to that standard.*

National Savings Bank v. Ward, 100 U.S. 195, 199 (1880) (emphasis added). Petitioner's proposed interpretation of the bona fide error defense would hold debt collector attorneys to an impossible ideal far above that owed to their own clients – *i.e.*, legal perfection. Petitioner's interpretation must be rejected as absurd. *Clinton*, 524 U.S. at 429.

Petitioner argues that ethical attorneys simply should exclude questionable fees and costs from collection communications to "forgo[] practices of questionable lawfulness[,]" (Pet. Br. 35), but Petitioner overlooks that federal and state law can be unclear on what charges are collectible. For example, for many years there was a good faith dispute in Ohio regarding whether the lender's foreclosure legal fees and costs could be included in a quote of the amount necessary to cure the borrower's default, or whether this practice violated Ohio public policy. *E.g., Washington Mutual Bank v. Mahaffey,* 796 N.E.2d 39, 45 (Ohio Ct. App. 2003) ("We see nothing against public policy in imposing the requirement of the payment of attorney fees expended in foreclosure proceedings as a condition

of reinstatement of a mortgage loan."); *but cf., Dollar Bank, FSB v. Petroff (In re Petroff)*, 47 Collier Bankr. Cas. 2d (MB) 665, No. 00-8085, 2001 Bankr. LEXIS 1594, at *12 (B.A.P. 6th Cir. July 25, 2001) ("Ohio law and public policy prohibit a lender from collecting attorney fees incident to foreclosure in ordinary mortgage transactions such as this one.") The Ohio Supreme Court finally resolved this issue in *Wilborn v. Bank One Corp.*, 906 N.E.2d 396, syllabus (Ohio 2009) (attorney fees and costs may be included in reinstatement quotes). A contrary ruling, however, would have provided the plaintiff's bar with broad and indefensible class actions against the lenders' counsel, who, in good faith, followed the holding and reasoning of *Mahaffey*.

Petitioner's proposal not only discourages the good faith advocacy that led to the *Wilborn* decision, but also would have the effect of disadvantaging ethical debt collectors. Under Petitioner's reading of the statute, ethical debt collectors would risk personal exposure for advocating the lawful but controversial claims of their clients. As a result, attorneys with less scruples or less net worth achieve the advantage.

Requiring debt collector attorneys to act as insurers of the legal validity of their clients' claims would result in an injustice to the public and the legal profession by discouraging good faith advocacy. Courts across the country have noted that making attorneys liable to opposing parties discourages ethical advocacy of clients. *E.g.*, *Shoemaker v. Gindlesberger*, 887 N.E.2d 1167, 1171 (Ohio 2008) ("an attorney's preoccupation or concern with potential negligence claims by third parties might diminish the quality of legal services provided to the client if the attorney were to weigh the

client's interest against the possibility of third-party lawsuits."); *Clark v. Druckman*, 624 S.E.2d 864, 868-69 (W. Va. 2005) (an attorney does not owe a duty of care to an opposing party such that the adversary may sue the attorney for negligence); *Shealy v. Lunsford*, 355 F. Supp.2d 820, 829 (M.D.N.C. 2005) (quoting *Petrou v. Hale*, 260 S.E.2d 130, 135 (N.C. Ct. App. 1979)) ("'if mere negligence in protecting the rights of an adverse party becomes the standard of liability, attorneys will be fearful of instituting lawsuits on behalf of their clients. The end result would be limitation of free access to the courts.'"); *Smith v. Griffiths*, 476 A.2d 22, 26 (Pa. Super. Ct. 1984) ("Where an attorney represents a client in litigation the public interest demands that attorneys in the proper exercise of their functions as such, not be liable to adverse parties for acts performed in good faith and for the honest purpose of protecting the interests of their clients."); *Guthrie v. Buckley*, 79 Fed. Appx. 637, 638 (5th Cir. 2003) (quoting *Bradt v. West*, 892 S.W.2d 56, 73 (Tex. Ct. App. 1994)) (allowing claims by a party against an opposing counsel "would 'favor *tentative* representation, not the *zealous* representation that our profession rightly regards as an ideal and that the public has a right to expect.'").

Authorities throughout the country agree that lawyers must be answerable only to their clients' needs without having to balance their own exposure. Petitioner proposes to make these lawyers strictly liable to the opposing party, which is an absurd result to be avoided in statutory construction. This Court has already observed the absurdity of this result. *Heintz*, 514 U.S. at 295.

C. Eliminating protection for bona fide legal errors would create disharmony with the civil rules and canons of ethics.

The civil rules already provide the bar for ethical advocacy. *E.g.*, FED. R. CIV. P. 11. An interpretation of the bona fide error defense to include good faith legal errors harmonizes section 1692k(c) with Rule 11. *See, e.g., Granny Goose Foods, Inc. v. Brotherhood of Teamsters*, 415 U.S. 423, 435 (1974) (this Court "can and should" interpret federal removal statute "in a manner which fully serves its underlying purposes, yet at the same time places it in harmony with ... Rule 65(b).").

Federal Rule 11(b)(2) permits attorneys to pursue claims that "are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law[.]" In permitting such claims, the rule recognizes the public policy interest in zealous advocacy and balances this interest with the objective of limiting frivolous lawsuits. After all, "the rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories." *Benedict v. Allen*, No. 00-1923 (CKK), 2001 U.S. Dist. LEXIS 26292, at *13-14 (D.D.C. Aug. 7, 2001) (quoting FED. R. CIV. P. 11, Advisory Comm. Notes on 1983 Amend.). However, in the absence of a bona fide error defense that applies to mistakes of law, debt collector attorneys could no longer pursue claims that seek a good faith "extension, modification, or reversal of existing law" without significant risk of FDCPA liability. Petitioner's request that this Court hold debt collector attorneys to a stricter standard than that set forth in Rule 11

abrogates Rule 11(b)(2), which is designed to promote healthy – and good faith – advocacy.

Petitioner and her amici further argue that if the bona fide error defense applies to errors of law, then it will create a "race to the bottom." Pet. Br. 32; Amicus Brief of Public Citizen, Inc., AARP, NACA, NCLC and US PIRG, p. 18. Petitioner and amici overlook, however, that "the bottom" is still governed by the civil rules, the canons of ethics, and the FDCPA's requirements that the legal error be bona fide, unintentional, and have occurred "notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." 15 U.S.C. § 1692k(c). Thus, the "race to the bottom" argument is both absurd and melodramatic.

An interpretation of the FDCPA's bona fide error defense that excludes good faith errors of law creates an absurd and unjust result for creditors' lawyers that Congress could not have intended. For this reason alone, this Court should affirm the decision of the Sixth Circuit Court of Appeals.

II. Application Of The Bona Fide Error Defense To Good Faith Legal Errors Is A Necessary Balance Within The FDCPA, Because The Act Contains Only Basic Statutory Guidance Without A Viable Safe Harbor Or Explanatory Regulations.

The FDPCA has been termed "static legislation" because the Act curbed existing debt collection abuses when enacted in 1977, but does not evolve with changes in technology and the debt collection industry. Lauren Goldberg, *Note, Dealing in Debt: the High-*

Stakes World of Debt Collection after FDCPA, 79 S. CAL. L. REV. 711, 718 (2006). The Act itself prohibits the FTC, or any other governmental agency, from promulgating regulations that would explain how the three-decade-old Act should be applied today. 15 U.S.C. § 1692l(d).

The FTC has acknowledged that "the passage of time and changes in technology and markets have created problems and uncertainties in the debt collection legal system for creditors, debt collectors, consumers, and others." FEDERAL TRADE COMMISSION, COLLECTING CONSUMER DEBTS: THE CHALLENGES OF CHANGE viii (Feb. 2009). Courts agree that the Act provides insufficient guidance. Some courts have taken the unusual step of drafting safe harbor language to provide instruction going forward. *See, e.g., Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, & Clark*, L.L.C., 214 F.3d 872, 876 (7th Cir. 2000) (Judge Posner crafted safe harbor language that, if used by a debt collector in a dunning letter, would be sufficient to "discharge[] his duty to state clearly the amount due" under the FDCPA as a matter of law.).

One example of the Act's failure to adapt to the changing times involves telephone answering machines, which were not in widespread use when the FDCPA was enacted. Shera Erskine, *Note and Comment, Please Leave a Message After the Tone: How Florida Lawyers Should Approach the "Mini-Miranda" Warning Requirement of the Fair Debt Collection Practices Act*, 32 NOVA L. REV. 245, 246 (2007). Section 1692d(6) requires a debt collector, upon "placement of telephone calls," to make "meaningful disclosure of the caller's identity," while section 1692c(b) prohibits a debt collector from communicating with third parties

concerning a consumer's debt. Because a message left by a debt collector on a consumer's answering machine may be heard by third parties, "debt collectors who use automated messages do so at the peril of violating the FDCPA, either by not leaving enough information for the debtor in violation of sections 1692d(6) and 1692e(11), or by leaving too much information for a possible third party in violation of section 1692c(b)." *Berg v. Merchants Ass'n Collection Div.*, 586 F. Supp.2d 1336, 1343 (S.D. Fla. 2008).

Even if a debt collector simply hangs up when greeted by an answering machine, it has arguably violated the Act because a call was "placed" without "meaningful disclosure of the caller's identity." 15 U.S.C. § 1692d(6). Caller identification devices that may disclose some information about the caller add further complications to telephone communications that could not have been contemplated by Congress at the time the Act was drafted. *See, e.g.*, *Saltzman v. I.C. System, Inc.*, No. 09-10096, 2009 U.S. Dist. LEXIS 90681, at *24-25 (E.D. Mich. Sept. 30, 2009) (Not only did the debt collector provide identification during a call, but debtor recognized the debt collector's phone number on caller-ID; as a result, there was no FDCPA violation). Although the Act clearly contemplates telephonic communication, the Act has not kept pace with changes in technology.

Against this backdrop, the American Collectors Association requested an advisory opinion from the FTC "on the answering machine message issue" in 2005. John H. Bedard, Jr., *Update on FDCPA Compliance and Litigation*, 61 CONSUMER FIN. L.Q. REP. 25 (2007). The FTC rejected the request, citing decisions of district courts addressing the issue, such

as decisions in California, Florida, New York, and Virginia. *Id.* The FTC's inability to provide uniform national guidance on this issue has left consumers "and debt collectors alike confused about the ability to leave a message in an attempt to collect a debt." Erskine, 32 NOVA L. REV. at 250.

Petitioner argues that debt collectors should rely exclusively on advisory opinions of the FTC as insulation from civil liability for an alleged violation of the Act. Pet. Br. 34. However, two criteria must be satisfied before the FTC will render such an opinion. First, the matter upon which an opinion is sought must "involve[] a substantial or novel question of fact or law and there is no clear Commission or court precedent[.]" 16 C.F.R. § 1.1(a)(1). Second, "[t]he subject matter of the request and consequent publication of Commission advice [must be] of significant public interest." § 1.1(a)(2).

Because the existence of court precedent forecloses the issuance of advisory opinions, this option is not a viable one for a debt collector seeking guidance on an issue that has been already been addressed by a court, as demonstrated by the FTC's decision not to issue an advisory opinion concerning the answering machine conundrum. The FTC has issued only four advisory opinions since the FDCPA was enacted in 1977,[5] and

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[5] Http://www.ftc.gov/os/statutes/fdcpajump.shtm. The FTC has issued more than 211 informal staff opinion letters. But, such informal opinions do not provide any guaranteed protection for debt collectors. *Hulshizer v. Global Credit Servs., Inc.*, 728 F.2d 1037, 1038 (8th Cir. 1984). And, the Commission has indicated that "[e]xcept in unusual circumstances, the staff will no longer issue informal written interpretations of the FDCPA. However,

the topics on which the FTC is authorized to issue opinions will decrease as case law develops.

Petitioner's argument that Congress adequately dealt with those situations "when legal uncertainty puts debt collectors at risk for liability" by granting the FTC permission to issue advisory opinions is unrealistic. Pet. Br. 28. Similarly, Petitioner's description of this process as a "simple" and "low-cost" solution to the debt collector's quandary is equally unrealistic. Pet. Br. 34. The exacting criteria that must be met before the Commission will issue an advisory opinion mean that such opinions will only be issued in exceedingly limited circumstances. Only a handful of FDCPA advisory opinions – four since 1977 – have been issued since the FDCPA was enacted. Both the language of the regulation governing the FTC's issuance of advisory opinions and the frequency of advisory opinions issued demonstrate that this option was obviously intended to *complement* the protection the bona fide error defense affords to mistakes of law. It could not have been intended as the exclusive protection for mistakes of law. The experience of the advisory opinion process further reveals that it is insufficient to accommodate technological advances and changes in the debt collection industry.

The bona fide error defense is a necessary balance within the Act to protect ethical debt collectors. Congress prohibited implementation of regulations

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the staff may issue informal opinions or revise its Staff Commentary as necessary to provide guidance regarding significant amendments to the FDCPA in the future." Http://www.ftc.gov/os/statutes/fdcpajump.shtm.

and included only basic instructions in the text of the FDCPA. As a result, debt collectors face myriad situations in which there is no clear instruction in the Act or state contract law. Congress built into the FDCPA the bona fide error defense which serves as a "narrow exception" to the otherwise strict liability imposed by the Act. *Reichert v. National Credit Sys.*, 531 F. 3d 1002, 1005 (9th Cir. 2008); *Kistner v. Law Offices of Michael P. Margelefsky*, 518 F.3d 433, 438 (6th Cir. 2008). Application of the FDCPA's bona fide error defense to those mistakes or misinterpretations of law that are made in good faith is a necessary balance to protect ethical debt collectors, and this balance will be subverted if protection for bona fide legal errors is abolished.

III. ELIMINATING LEGAL ERRORS FROM THE PROTECTION OF THE BONA FIDE ERROR DEFENSE WOULD MULTIPLY THE "COTTAGE INDUSTRY" OF SOPHISTICATED CONSUMERS AND THEIR COUNSEL PREYING UPON TECHNICAL VIOLATIONS OF THE FDCPA.

Legal writers have observed a spike in FDCPA lawsuits in recent years. *E.g.*, Sheri Qualters, *Debt Firms Slammed by Consumer Lawsuits*, LAW.COM (June 12, 2007).[6] TransUnion, working with FDCPA Case Listing Service, LLC, has found that "5,383 cases were filed in 2008 against collection agencies in U.S. District Court for alleged violations of the Fair Debt Collections Practices Act (FDCPA). This represents a 41 percent increase in FDCPA litigation in 2008 in

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[6] Available at http://www.law.com/jsp/law/ LawArticleFriendly jsp?id=900005555661.

Federal Court over 2007 case volumes." Dave Blumberg, *TransUnion Alerts Collectors of Accounts Involved in Collection Litigation*, REUTERS, TRANSUNION, June 22, 2009.[7] In many instances, the claims asserted in such suits involve "technical violations" of the Act. Roger M. Whelan and Robert M. Zinman, *Suggested Reading: Complete Guide to Credit and Collection Law*, 23-5 AMERICAN BANKR. INST. L.J. 38 (June 2004) (quoting Arthur Winston and Jay Winston, COMPLETE GUIDE TO CREDIT AND COLLECTION LAW (2d. ed. 2004)). If the bona fide error defense's applicability to mistakes of law is eliminated, there would undoubtedly be an increase in cases involving minor technical violations of the Act where the law is unsettled. Such an interpretation of the defense would encourage costly litigation that would not further the underlying purpose of the FDCPA.

Even now, courts have indicated distress that the parties who sue under the FDCPA are often not the parties who Congress meant to protect. The Sixth Circuit has noted that:

> '[i]ronically, it is often the extremely sophisticated consumer as opposed to the least-sophisticated consumer who takes advantage of the civil liability scheme defined by this statute, not the individual who has been threatened or misled. The cottage industry that has emerged does not bring suits to remedy the 'widespread and serious national problem' of abuse that the Senate observed in adopting the legislation[.]'

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[7] Available at http://newsroom.transunion.com/index.php?s=43&item=530.

Federal Home Loan Mortgage Corp. v. Lamar, 503 F.3d 504, 513 (6th Cir. 2007) (quoting *Jacobson v. Healthcare Fin'l Servs., Inc.*, 434 F. Supp.2d 133, 138 (E.D.N.Y. 2006)); *Murphy v. Equifax Check Servs., Inc.*, 35 F. Supp. 2d 200, 204 (D. Conn. 1999) ("there is nothing in the Act suggesting that it was intended to create a cottage industry for the production of attorney's fees."); *Miller v. Javitch, Block, & Rathbone*, 561 F.3d 588 (6th Cir. 2009).

The Appendix to this brief contains a table compiled from a LexisNexis search of FDCPA suits filed in the federal courts over the last eleven years. The table shows that FDCPA suits increased gradually throughout the early part of this decade, but doubled in frequency between 2006 and 2009. The biggest increase in FDCPA suits has occurred this year.

Petitioner argues that if this Court allows good faith legal errors to receive the protection of the FDCPA bona fide error defense, aggrieved debtors will be dissuaded from seeking redress for their valid claims. Pet. Br. 33-34. Petitioner offers no support for this claim. *Id.* In fact, the numbers indicate that this argument has no merit. *See*, Chart of Federal FDCPA cases, attached Appendix.

The only circuit, prior to this case, to hold unequivocally that the bona fide error defense applies to mistakes of law is the Tenth Circuit. *Johnson v. Riddle*, 305 F.3d 1107, 1121 (10th Cir. 2002). Although the sample is small, new federal FDCPA complaints in the Tenth Circuit have increased 391.04% since 2002 (134 per year to 524 per year), while cases throughout the country have increased 313.14% (2,900 per year to 9,081 per year) over the same period. There is simply

no evidence that the broader defense is discouraging meritorious filings. To the contrary, there is plenty of evidence of a "cottage industry" of professional plaintiffs looking for a windfall at the expense of good faith debt collector attorneys.

The case at bar presents a perfect example of a case filed by a consumer based upon a purely technical question under the FDCPA. At the time the foreclosure complaint was filed, the Sixth Circuit had not decided the issue of whether borrowers need to dispute a debt in writing under the FDCPA, and so the Respondents did not have clear instructions with which to interpret the Act. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, LPA*, 502 F. Supp. 2d 686, 695-96 (N.D. Ohio 2007). Respondents chose to follow existing case law within their circuit that held the writing requirement proper. *Jerman*, 505 F. Supp. 2d at 696; *Savage v. Hatcher*, 109 Fed. Appx. 759, 762 (6th Cir. 2004) (unreported); *see also, Graziano v. Harrison*, 950 F.2d 107, 112 (3rd Cir. 1991) (holding that for Section 1692g to be coherent, the communication disputing a debt must be in writing). The two words Respondents included in their notice had absolutely no impact on Petitioner. Nevertheless, Petitioner paid off the debt and, shortly thereafter, filed a putative class action against the creditor's attorney. *Jerman*, 538 F.3d at 471-72. The district court found Respondents had technically violated the Act.

Respondents were held to a stricter standard of pleading under the FDCPA than under the ethical canons or Rule 11, and Respondents were protected from liability only by the bona fide error defense. *Jerman*, 502 F. Supp. 2d at 697. Petitioner seeks to enrich her position, and that of her attorneys, based

upon two words included in the foreclosure complaint's validation notice that caused her no actual harm. Petitioner seeks to hold the Respondents to a standard of legal perfection under the FDCPA based upon a question of unsettled law. To eliminate Respondents' only affirmative defense under the FDCPA would defeat the purpose of the Act and unfairly punish a good faith debt collector. As demonstrated by the case at bar, application of the bona fide error defense to good faith legal errors is a necessary protection for debt collectors. 15 U.S.C. §§ 1692(e), 1692k(c).

CONCLUSION

For the foregoing reasons, the Sixth Circuit's decision in *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, LPA*, 538 F.3d 469 (6th Cir. 2008) must be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

Federal FDCPA Lawsuits Filed By Circuit*											
	1999	**2000**	**2001**	**2002**	**2003**	**2004**	**2005**	**2006**	**2007**	**2008**	**2009**
1st Cir.	32	34	22	27	38	45	64	72	67	61	117
2nd Cir.	359	389	405	475	484	526	601	608	458	522	718
3rd Cir.	100	162	203	250	322	381	429	409	426	654	706
4th Cir.	118	108	112	130	155	167	151	177	157	187	297
5th Cir.	211	161	185	223	231	280	216	243	263	315	416
6th Cir.	125	134	135	156	165	223	372	223	472	653	791
7th Cir.	535	495	489	533	707	849	895	952	889	840	1103
8th Cir.	198	260	305	297	283	257	213	275	284	399	698
9th Cir.**	307	330	349	431	522	505	680	810	787	1082	2161
10th Cir.	92	106	118	134	160	150	158	280	376	539	524
11th Cir.	260	269	267	244	294	393	387	486	968	1349	1550
TOTAL	**2337**	**2448**	**2590**	**2900**	**3361**	**3776**	**4166**	**4535**	**5147**	**6601**	**9081**

* This chart was prepared from a LexisNexis search. The end date of the search is November 20, 2009. The LexisNexis search criteria was "U.S. District Courts, Civil Filings (Docket Summary)" database under the Public Records category. As of 1998, this database provides case summaries for all U.S. District Court filings except Alaska. Cases filed in Alaska are *not* included in the table. The summaries provide the court name, district or division, docket number, filing date, judge, nature-of-suit, litigants involved, and their respective attorneys.

To replicate the search, select the search tab in LexisNexis. In "Option 2," choose the Public Records tab; then choose "Find Filings;" then choose "Civil & Criminal Court Filings and Regulatory Actions;" then click "Filing Extracts." Next, choose "U.S. District Courts, Civil Filings (Docket Summary);" then choose "New Search." Next, input the appropriate search string in the "Terms and Connectors" box for a circuit. For example, the search query performed for the First Circuit was "FDCPA or F.D.C.P.A. or Fair Debt Collections or (15 pre/3 1692) and DISTRICT COURT OF MAINE or DISTRICT OF MASSACHUSETTS or DISTRICT OF NEW HAMPSHIRE or DISTRICT OF RHODE ISLAND or DISTRICT OF PUERTO RICO." Finally, under "Restrict by Date" put the applicable date range (*i.e.*, 01/01/1999 – 12/31/1999).

** Does not include data from Alaska

AMICUS CURIAE BRIEF

No. 08-1200

In The Supreme Court of the United States

KAREN L. JERMAN,

Petitioner,

v.

CARLISLE, McNELLIE, RINI, KRAMER & ULRICH LPA AND ADRIENNE S. FOSTER,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR THE CALIFORNIA ASSOCIATION OF COLLECTORS AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

The California Association of Collectors, Inc. ("CAC") is a statewide association of California-based collection agencies, debt collectors, and other credit professionals, including lawyers, who form the California Unit of the American Collectors Association International, a national association of collection agencies, creditors, and credit professionals. The CAC has approximately 400 agency members. The purpose of the CAC is to promote, stimulate, increase and improve the educational, social, economic and ethical welfare of the California collection industry, and to educate its members, as well as the public which it serves. The CAC strives to apply the collective knowledge and experience of its members toward promoting ethical and professional standards of collection service.[1]

The CAC members represent approximately 15% of the total debt collector membership of ACA International. CAC members regularly act as "third-party collectors" in collecting debts assigned to them by California businesses and other businesses throughout the nation. Members of the CAC also

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[1] No counsel for a party authored any part of this brief – the filing of which has been consented to by all parties – and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of the brief. Letters reflecting the blanket consent of the parties to permit briefing by *amicus curiae* have been filed with the clerk.

include "first-party" creditors (parties who are collecting their own debts), as well as government entity collection departments. Attorneys and law firms regularly represent the members of the CAC in state court collection actions.

The CAC assists its members with compliance with various laws and regulations, including the Fair Debt Collection Practices Act (FDCPA) through education, training and the like. The CAC encourages and emphasizes compliance with the FDCPA and other consumer protection statutes, and the organization acts as a resource to its members in keeping abreast of the changing developments in relevant law.

Notwithstanding this emphasis on professionalism and compliance, California debt collectors are frequently the targets of lawsuits brought under the FDCPA. Through October of 2009, 6,809 federal court cases alleging FDCPA violations have been filed in 2009 against debt collectors throughout the nation. (*See* Am. Collectors Assn. Int'l, Inc., Cases, Claims & Industry News, at http://www.acainternational.org/compliance-cases-claims-industry-news-8947.aspx (last visited Nov. 23, 2009) (providing statistical information regarding FDCPA case filings, itemized by month)). Sixteen percent of the 6,809 cases were filed in California – more than any other state. *Ibid.* At this pace, we can extrapolate that perhaps as many as 8,170 cases may be filed by the end of 2009. This is a 52% increase over the federal court filings in 2008, which totaled 5,383 cases. *Ibid.* The 2009 filing figure

is a 115% increase over the number of federal court filings in 2007, which totaled 3,807 cases. These figures do not include state court filings. They do not consider settlements reached before suit. Simply put, as the FDCPA case load becomes heavier, the bona fide error defense is more important than ever, and, hence, CAC's interest and concern.

SUMMARY OF ARGUMENT

I. Congressional intent and the purpose behind the FDCPA support the conclusion that the bona fide error defense applies to legal errors. The language of the statute itself at 15 U.S.C. section 1692k(c), the relevant legislative history (*see, e.g.*, S. Rep. No. 95-382, at 5 (1977)), as well as the goals of the statute are all consistent with applying the bona fide error defense to legal errors.

II. Petitioner's assertion that "ignorance of the law is never a defense" is a straw man argument. Applying the bona fide error defense to so-called errors of law is not at all equivalent to sanctioning an ignorance of the law defense. Indeed, the bona fide error defense relies on knowledge and procedures. The bona fide error defense is not an immunity; it is an affirmative defense that must be established by a collector. The bona fide error defense was designed to apply, and should apply, to all violations by a debt collector, whether a lay collector, or, as here, a law firm representing a creditor, where the elements of the bona fide error defense are met.

III. Given the seemingly ever-evolving requirements under the FDCPA's statutory scheme, the CAC submits it is doubtful that Congress meant to impose strict liability on debt collectors who have failed to correctly anticipate the ultimate resolution of legal issues that have divided the federal courts themselves. The CAC submits it would be unjust and unfair, and not consistent with the FDCPA's design,

if the bona fide error defense is not available to all debt collectors that exercise good faith in attempting to comply with the FDCPA and maintain reasonable procedures to ensure such compliance. Such a holding would competitively disadvantage debt collectors who set up procedures to avoid or eliminate abusive practices in contravention to the statute's intent. *See* 15 U.S.C. § 1692(e).

IV. The bona fide error defense should not be narrowly interpreted to merely apply to legal misinterpretations as to the rights and obligations arising under the FDCPA itself, or to the Act's coverage. While the FDCPA applies to such errors, other "errors of law" should also be deemed to provide a basis for asserting the defense, so long as the elements of the bona fide error defense are met.

ARGUMENT

Question: Does the bona fide error defense found at 15 U.S.C. section 1692k(c) apply to errors of law? ***Answer***: Yes, it does.

The CAC does not intend to duplicate the statutory interpretation and legislative history arguments and analyses already addressed and submitted by the parties or other *amici curiae*, to this Honorable Court in earlier briefs. The Respondents, the Ohio Creditor's Attorneys Association and the California Creditor's Bar Association have previously submitted briefing which exhaustively interprets the respective language and legislative histories of the bona fide error defenses found in the FDCPA and the Truth in Lending Act ("TILA").

The more persuasive view by far is that the FDCPA's bona fide error defense applies to legal errors. This is evidenced by, among other things, a review of the plain language of the FDCPA that contains no language of limitation, by a comparative review of the TILA bona fide error statute that demonstrates the intent to limit its application, and by a review of the FDCPA's legislative history that strongly suggests the bona fide error defense was to apply to conduct that "violates the act in any manner, including with regard to the act's coverage." S. Rep. No. 95-382, at 5 (1977).

I. Congressional Intent Underlying the FDCPA Must Be Considered When Determining Whether the Bona Fide Error Defense Applies to Legal Errors.

Congress enacted the FDCPA in 1977 in order to eliminate abusive debt collection practices by debt collectors, to ensure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent state action to protect consumers against debt collection abuses. 15 U.S.C. § 1692(e).

In determining whether a collection practice violates the FDCPA, the text of the statute is not the end of the inquiry; the text must be construed by reference to, and with consideration of, the purpose behind the FDCPA itself. *See, e.g., Pressley v. Capital Credit & Collection Service, Inc.*, 760 F.2d 922, 924 (9th Cir. 1985).

It is well established that one of the most important purposes of the FDCPA is to assist in preventing violations by providing a mechanism for debtors to "dispute" the validity or amount of the debt being collected, rather than penalizing collectors for their honest mistakes. *See, e.g.*, 15 U.S.C. § 1692g; *Bleich v. The Revenue Maximization Group*, 233 F.Supp.2d 496, 500-01 (E.D.N.Y. 2002) (debt collectors not liable for an FDCPA violation for demanding the wrong amount in its initial collection letter since the very purpose of the FDCPA is to provide a mechanism for consumers to dispute and permit debt

collectors to correct an erroneously asserted debt); *accord Palmer v. I.C. System, Inc.*, No. C-04-03237 RMW, 2005 WL 3001877, at *4-5 (N.D. Cal. Nov. 8, 2005). In *Terran v. Kaplan*, 109 F.3d 1428 (9th Cir. 1997), the Ninth Circuit recognized that Congress enacted the FDCPA in part to "eliminate the recurring problem of debt collectors dunning the wrong person or attempting to collect debts which the consumer has already paid." *Id.* at 1431.

A second purpose behind the enactment of the FDCPA was to provide a remedial scheme that permits wronged individuals to act as private attorneys general in enforcing the statutory scheme's rights and obligations; attorney's fees were provided as an incentive for private enforcement. 15 U.S.C. § 1692k(a)(3).[2] The FDCPA may be seen as codifying

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[2] Several federal courts have commented upon the potentially adverse effects the attorney's fees provision plays in creating an incentive to file questionable FDCPA lawsuits (*see, e.g., Miller v. Javitch, Black and Rathbone*, 561 F.3d 588, 596 (6th Cir. 2009)), as well as creating an incentive to ask for excessive fees. *See Sanders v. Jackson*, 209 F.3d 998, 1004 (7th Cir. 2000) (noting that plaintiff's attorneys "have a strong interest to litigate these cases – often times despite their marginal impact – in the form of attorneys' fees and costs they hope to recover. . . . The history of FDCPA litigation shows that most cases have resulted in limited recoveries for plaintiffs and hefty fees for their attorneys"); *see also Murphy v. Equifax Check Servs., Inc.*, 35 F.Supp.2d 200, 204 (D. Conn. 1999) (suggesting that the continuation of the FDCPA action merely increased attorney's fees and noting the FDCPA was not intended to "create a cottage industry for the production of attorney's fees").

and making wrongful, uniformly and consistently, the type of activity by a debt collector previously deemed to constitute a common law tort under a hodgepodge of heterodox state laws such as abuse of process, malicious prosecution, intentional infliction of emotional distress and invasion of privacy.

The intent of Congress was to create a comprehensive, yet limited,[3] remedial scheme, uniform throughout the country, to prevent egregiously unfair and deceptive debt collection practices. 15 U.S.C. § 1692(a)-(e). The legislation was also designed to prevent harassment in the collection of debts, such as the use of obscene or profane language, threats of violence, and telephone calls at unreasonable hours. *Green v. Hocking*, 9 F.3d 18, 21 (6th Cir. 1993), *overruled on other grounds sub. nom., Heintz v. Jenkins*, 514 U.S. 291 (1995); *accord Romaine v. Diversified Collection Services, Inc.*, 155 F.3d 1142, 1149 (9th Cir. 1998). In *Romaine*, the Ninth Circuit

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[3] The limited nature of the remedial scheme is demonstrated by the FDCPA's damages scheme. Statutory damages in an individual action are limited to no more than $1,000, no matter how many violations. 15 U.S.C. § 1692k(a)(2)(A); *Wright v. Finance Service of Norwalk, Inc.*, 22 F.3d 647, 651 (6th Cir. 1994). Statutory damages in a class action are limited to no more than $500,000, or 1% of the debt collector's net worth, whichever is less. 15 U.S.C. § 1692k(a)(2)(B). Punitive damages are not permitted (*Gervais v. O'Connell, Harris & Associates, Inc.*, 297 F.Supp.2d 435, 440 (N.D. Conn. 2003)); nor is injunctive relief (*Weiss v. Regal Collections*, 385 F.3d 337, 342 (3d Cir. 2004)).

identified the type of prototypical collection abuses the legislation was designed to address:

> . . . obscene or profane language, threats of violence, telephone calls at unreasonable hours, misrepresentation of a consumer's legal rights, disclosing a consumer's personal affairs to friends, neighbors, or an employer, obtaining information about a consumer through false pretense, impersonating public officials and attorneys, and simulating legal process.

Romaine, 155 F.3d at 1149.

Where a collector's activity "in no way exemplifies the abusive behavior or false and misleading practices that Congress had in mind when it enacted the FDCPA," no violation should be deemed to exist. *Morse v. Dun & Bradstreet, Inc.*, 87 F.Supp.2d 901, 904 (D. Minn. 2000). This is because the FDCPA was enacted as a "shield" not a "sword." *Emanuel v. American Credit Exchange*, 870 F.2d 805, 808 (2d Cir. 1989). The statutory scheme was not intended to create a "windfall" for debtors. *Clark v. Capital Credit & Collection Services, Inc.*, 460 F.3d 1162, 1178 (9th Cir. 2006). As stated in *Ducrest v. Alco Collections, Inc.*, 931 F.Supp. 459 (M.D. La. 1996), the primary inquiry should be *whether the debt collector has acted unscrupulously toward the plaintiff in its conduct.* The Court in *Ducrest* observed:

> The Ninth Circuit illustrated this in *Baker v. G.C. Services Corp.* [677 F.2d 775, 777 (9th Cir. 1982)] saying, '[t]he act (FDCPA) is

> designed to protect consumers who have been victimized by unscrupulous debt collectors, regardless of whether a valid debt actually exists.' *The basis of Plaintiff's claim under the FDCPA should be that defendant has acted unscrupulously in attempting to collect a debt. . . . The focus of this inquiry is on the debt collector's conduct.*

Id. at 462 (emphasis added).

The current case before the Court perfectly illustrates the good and the bad aspects of the FDCPA. On the one hand, Respondent law firm filed a collection/enforcement lawsuit against Ms. Jerman for the foreclosure of property securing a debt. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 538 F.3d 469, 471 (6th Cir. 2008). The law firm sent Ms. Jerman a so-called validation of debt notice, as required by 15 U.S.C. section 1692g.

Based upon Respondent law firm's policies and procedures and based upon continuing research and efforts to keep abreast with the controlling law (Respondent's Brief at pp. 1-2, ¶ 2), the notice advised that unless Ms. Jerman disputed the debt in writing, the debt would be assumed to be valid pursuant to 15 U.S.C. section 1692g(a)(3). *Id.* at 471.

Ms. Jerman's counsel responded with a letter of his own disputing the debt, as was Ms. Jerman's right under section 1692g. This written dispute placed a correlative duty upon Respondents to verify or "validate" the debt. 15 U.S.C. § 1692g(b). Pursuant to

section 1692g(b), Respondents, in turn, requested verification from their creditor client, and the creditor informed Respondents that, in fact, the debt had been paid in full. Respondents' Brief, p. 3, ¶ 3. Respondents thereafter promptly dismissed the foreclosure action less than one month after filing. *Jerman*, 538 F.3d at 471.

Thus, the FDCPA served its intended purpose. The notice and dispute process resulted in the erroneously initiated collection lawsuit being dismissed even before a response was filed.

On the other hand, after the Respondents dismissed the suit, Petitioner turned around and sued Respondents in a derivative class action lawsuit, pointing out that the validation notice added the phrase "in writing" to the language set forth in section 1692g(a)(3) and, as such, failed to follow the exact language of that subsection.

As correctly pointed out in the Respondents' briefing to the Court, and as discussed further *infra*, there was nothing unreasonable in Respondents' interpretation, based upon its research, that "in writing" should be added to comply with the purpose and intent of the validation mechanism embodied in section 1692g as a whole. *See, e.g.*, 15 U.S.C. § 1692g(a)(4) (referencing "writing"); § 1692g(a)(5) (referencing "written request"); § 1692g(b) (referencing "writing"); *Graziano v. Harrison*, 950 F.2d 107, 111-12 (3d Cir. 1999); *accord Ingram v. Corporate Receivables,*

Inc., No. 02 C 6608, 2003 WL 21018650, at *6-7 (N.D. Ill. May 5, 2003) (a refusal to imply a writing requirement into section 1692g(a)(3) "has the untoward effect of depriving the unsophisticated consumers who are the particular objects of the FDCPA's solicitude of important rights that Congress sought to confer on them").

There was nothing remotely unscrupulous about the conduct of the Respondents at issue here. But, Petitioner nonetheless attempted to turn the FDCPA into a "sword" after it had served its purpose as a "shield." *Compare Miller,* 561 F.3d at 596; *Fox v. Citicorp Credit Svcs., Inc.*, 15 F.3d 1507, 1518 (9th Cir. 1994) ("what mountains have been made of mole hills"). The District Court and the Sixth Circuit properly rejected Petitioner's claim based upon the bona fide error defense.

II. Petitioner's Assertion That Ignorance of the Law Is Not a Defense Is Not a Valid Argument with Respect to Applying the Bona Fide Error Defense to Legal Errors.

Petitioner, and the *amici curiae* supporting Petitioner, repeatedly argue that "ignorance of the law is no defense" and, thus, the bona fide error defense should not apply to legal errors. This argument is perplexing as Respondent has never suggested that ignorance of the law is a defense. This is simply a straw man argument set up by Petitioner for her to easily knock down.

The Sixth Circuit did not rule in favor of Respondents because they were *ignorant* of the law, rather quite the opposite. The Sixth Circuit granted Respondents' motion for summary judgment because Respondents established that they were extremely knowledgeable about the law based upon procedures put in place for education and compliance. *See generally* Respondents' Brief, at pp. 1-3. Yet, despite their compliance procedures, the firm sent a validation notice that was held, contrary to other federal court authority, not to comply with the FDCPA. *Jerman,* 538 F.3d at 477.

If Respondents' defense had been "we have never heard of the FDCPA so we should not be held liable," the Sixth Circuit could have, and certainly would have, denied Respondents' motion for summary judgment based upon the bona fide error defense.

Both Petitioner and *amicus curiae*, the United States, argue that applying the bona fide error defense to errors of law provides debt collectors with an ignorance of the law defense which is not provided to other members of society. This "ignorance of the law" argument is wholly inapplicable under the facts presented here. The mere fact that sending the violative notice was intentional is not the same as saying the violation was intended. *Lewis v. ACB Bus. Servs., Inc.*, 135 F.3d 389, 402 (6th Cir. 1998). Courts have long recognized this distinction. For instance, in *Juras v. Aman Collection Serv., Inc.*, 829 F.2d 739, 741 (9th Cir. 1987), a debt collector violated the FDCPA by calling before 8:00 a.m., notwithstanding

procedures designed to prevent this sort of violation. While the call was intentionally placed, the violation was not intentional. The Court found that the bona fide error defense applied.

III. As Compliance with the FDCPA Is an Ever-Moving Target, the Bona Fide Error Defense Should Be Available to Debt Collectors That Maintain Procedures Designed to Stay Abreast of Those Changes.

The FDCPA possesses the seemingly contradictory qualities of being both detailed and vague. In this way, it imposes some very specific requirements on debt collectors (*see, e.g.*, § 1692j) yet prohibits broad categories of activity such as harassment, deceptive and misleading statements, and unconscionable conduct. *See, e.g.*, 15 U.S.C. §§ 1692d, 1692e, 1692f. The statutory scheme is thus highly susceptible to, and dependent on, judicial interpretation.

As FDCPA jurisprudence is largely "judge-made," trying to anticipate the correct interpretation may constitute a trap for even the most careful and conscientious debt collector. "New" violations of the FDCPA, based upon often highly technical interpretations occur regularly, and these gain traction quickly, spreading throughout the district courts across the country. In this way, conduct that has long been an established safe practice in the debt collection industry, to which no objection has previously been

raised, may be determined to violate the law. Additionally, as the statute is vague in places, there is ample opportunity for different courts to disagree. Which ruling to follow is a quandary for collectors and supports application of the bona fide error defense to errors of law.

A. Whether a Validation Notice Violates the Law by Including or Failing to Include the Words "In Writing" Was and Remains an Unsettled Area of Law.

The instant case provides a paradigmatic example of an FDCPA violation found by the underlying District Court, where other courts would not have found a violation. The question presented was whether a validation notice sent to a debtor should provide a warning that a debtor's "written" dispute was necessary to prevent the debt collector from assuming the debt was valid. *See* 15 U.S.C. § 1692g(a)(3). The language of section 1692g itself is unclear. An in-depth review of the unsettled nature of the legal issue facing Respondents in early 2006, when the notice was sent to Ms. Jerman, helps to provide context for the issue before this Court.

At the time Respondents sent the challenged notice, courts were split on whether an "in writing" requirement was to be implied in section 1692g(a)(3). The Third Circuit had previously held that inclusion of the phrase "in writing" in a section 1692g(a)(3) notice was not a violation of the FDCPA but, instead, significantly advanced the public policies of the

FDCPA, and aided debtors. *See Graziano*, 950 F.2d at 111-12. In December 2005, shortly before the notice to Ms. Jerman was sent, the Ninth Circuit took the opposite position in *Camacho v. Bridgeport Fin., Inc.*, 430 F.3d 1078, 1082 (9th Cir. 2005). Prior to *Camacho*, however, the Ninth Circuit had seemingly ruled the other way. *Mahon v. Credit Bureau of Placer County*, 171 F.3d 1197, 1202 (9th Cir. 1997). There, the Ninth Circuit, in generally addressing the requirements that a debtor must fulfill in order to trigger the validation of debts mechanism, wrote: "If no *written* demand is made, the collector may assume the debt to be valid." *Id.* at 1202 (emphasis added). District courts in other circuits were likewise divided on the question. *Compare, e.g.*, *Wallace v. Capital One Bank*, 168 F.Supp.2d 526, 529 (D. Md. 2001) (finding an "in-writing requirement") *with Baez v. Wagner & Hunt, P.A.*, 442 F.Supp.2d 1273, 1276-77 (S.D. Fla. 2006) (finding no such requirement).

Section 1692g sets forth the FDCPA's "validation of debts" provisions. These provisions form the heart of the FDCPA's debt correction and dispute mechanism. *See, e.g.*, *Mahon*, 171 F.3d at 1200-02; *Bleich*, 233 F.Supp.2d at 499-500; 15 U.S.C. § 1692g. By this procedure, a debtor who is contacted by a debt collector about a putative debt has the right to notify the collector that he or she does not owe the debt, or only owes part of the debt. *See generally* 15 U.S.C. § 1692g(a)-(b).

In *Bleich*, the District Court reviewed carefully, both the intent underlying the FDCPA generally, and the purpose behind the validation notice provisions specifically:

> The FDCPA (the "Act") was enacted to eliminate the use of unscrupulous practices in the debt collection industry. *Russell v. Equifax A.R.S.*, 74 F.3d 30, 33 (2d Cir. 1996); *Grief v. Wilson, Elser Moskowitz, Edelman & Dicker, LLP*, 217 F.Supp.2d 336, 338 (E.D.N.Y. 2002). The Act makes certain particular practices, including threats of violence made in connection with the attempt to collect a debt, expressly unlawful. *See* 15 U.S.C. § 1692d. Also made illegal by the FDCPA are the general use of any "false, deceptive or misleading representation or means" used in the attempt to collect a debt. *See* 15 U.S.C. § 1692e.

Bleich, 233 F.Supp.2d at 499.

The District Court continued:

> In addition to the prohibition of certain practices, the FDCPA places an affirmative duty, on those engaged in the business of debt collection, to provide certain information to debtors. Specifically, the Act requires that particular language, that has come to be known as the "validation notice," be placed in correspondence used to collect debts.

Id. at 499.

The District Court explained the validation of debts mechanism this way:

> [T]he FDCPA sets forth a detailed procedure for disputing the validity of a debt. The consumer is given the immediate opportunity to dispute the debt and upon the making of a request for debt verification, all collection efforts must cease. *See* 15 U.S.C. § 1692g(a). This debt validation procedure must be clearly communicated to the consumer and courts are loathe to allow debt collectors to vary from, or contradict, the statutory notification. Indeed, the failure to communicate clearly the validation procedure forms the basis of many FDCPA lawsuits. *See e.g.*, *Russell*, 74 F.3d at 34 (requiring that validation notice be understood by the "least sophisticated consumer"); *see also Savino v. Computer Credit Inc.*, 164 F.3d 81, 85-86 (2d Cir. 1998) (holding validation notice unlawful because request for "immediate payment" overshadowed validation notice thirty day period); *Monokrousos v. Computer Credit, Inc.*, 984 F.Supp. 233, 234 (S.D.N.Y. 1997) (letter held to violate FDCPA where validation notice was contradicted by request for payment prior to expiration of thirty day validation period).

Id. at 500.

Subsections (a) and (b) of section 1692g make repeated reference to the *debtor's obligation* to provide *written notice* to the debt collector within 30 days (*see, e.g.*, 15 U.S.C. § 1692g(a)(4), (a)(5), (b)) in order

to invoke his or her rights, and so as to impose, or trigger, the statutorily mandated validation duties on the debt collector. Likewise, section 1692g(b) refers to the requirement that consumer notification of a dispute must occur (1) in writing and (2) within 30 days, in order to stop the collection process.

The specific language of section 1692g(a)(3) also references the requirements of (1) notice and (2) within 30 days, but the subsection is silent on whether the notice must be written – unlike the provisions of section 1692g(a)(4), (a)(5), and (b). In short, section 1692g(a)(3), when analyzed in isolation, is unique in not requiring that the debtor's dispute be in writing.

It is perhaps significant for purposes of the "interpretation" which Respondents chose to follow that the federal courts have repeatedly found that "[s]ection 1692g of the FDCPA itself is confusing," and even more so for the "least sophisticated debtor." *See, e.g., In re Risk Mgmt. Alternatives, Inc.*, 208 F.R.D. 493, 502 (S.D.N.Y. 2002). Indeed, in *In re Risk Mgmt. Alternatives, Inc.*, the District Court grudgingly interpreted section 1692g(a)(3) in the way proposed by Petitioner and adopted by the District Court here, but noted that this interpretation did *not* appear to support the spirit or intent behind section 1692g, in particular, or the FDCPA's statutory scheme taken as a whole. *In re Risk Mgmt. Alternatives, Inc.*, 208 F.R.D. at 502 (finding a section 1692g(a)(3) violation because of the perceived judicial constraint limiting the Court's analysis to the strict or plain language of the statute). Thus, the Court in *In re Risk Mgmt.*

Alternatives, Inc., ruled in favor of the debtor, but observed that the debtor's reliance on a so-called "plain language" interpretation of the statute led to a "silly result and one hopes that it is not what Congress had in mind." *Id.* at 502.

The Third Circuit's *Graziano* decision highlighted the apparent contradiction between the absence of a writing requirement in section 1692g(a)(3) and the legislative intent embodied in section 1692g as a whole.

In *Graziano, supra*, the debtor made allegations against the defendant similar to the ones Ms. Jerman raised against the Respondents here. *Graziano*, 950 F.2d at 111-12. In rejecting the plaintiff's arguments, the Third Circuit held:

> [W]e are of the view that, given the entire structure of section 1692g, subsection (a)(3) must be read to require that a dispute, to be effective, must be in writing. . . . [¶] We therefore conclude that subsection (a)(3), like subsections (a)(4) and (a)(5), contemplates that any dispute, to be effective, must be in writing. The district court was not in error in determining that the requirements of a writing did not render the statutory notice invalid.

Id. at 112.

The *Graziano* Court reasoned:

> Adopting Graziano's reading of the statute would thus create a situation in which, upon

> the debtor's non-written dispute, the debt collector would be without any statutory ground for assuming that the debt was valid, but nevertheless would not be required to verify the debt or to advise the debtor of the identity of the original creditor and would be permitted to continue debt collection efforts. We see no reason to attribute to Congress an intent to create so incoherent a system. We also note that there are strong reasons to prefer that a dispute of a debt be in writing; a writing creates a lasting record of the fact that the debt has been disputed and thus avoids a source of potential conflicts.

Id. at 112.

Graziano's reasoning seems persuasive on this basis alone. Therefore, the *Graziano* Court held that the collector did not violate the FDCPA when it stated in its initial section 1692g notice that unless the debtor disputed the debt in writing within thirty days, the debt would be assumed valid. *Id.* at 112.

At the time that Respondents evaluated the state of the law and sent the section 1692g notice to Petitioner, *Graziano* was not the only court to have ruled that a collector did not violate the FDCPA when it stated in its initial section 1692g notice that unless the debtor disputed the debt in writing within thirty days, the debt would be assumed valid. *See, e.g.*, *Jolly v. Shapiro*, 237 F.Supp.2d 888, 894-95 (N.D. Ill. 2002) (finding reasoning of *Graziano* persuasive); *Wallace v. Capital One Bank*, 168 F.Supp.2d 526, 529 (D. Md.

2001) ("if [defendant] invited an oral communication disputing the debt from the debtor, it might induce the debtor to waive her rights under section 1692g(a)(4) and (5) which require a writing to invoke the rights conferred by those sections"); *Sturdevant v. Jolas*, 942 F.Supp. 426, 429 (W.D. Wis. 1996); *Forsberg v. Fid. Nat'l Credit Servs.*, No. 03CV2193-DMS(AJB), 2004 WL 3510771, at *4 (S.D. Cal. Feb. 26, 2004) (writing requirement in a section 1692g(a)(3) notice did not violate the FDCPA because a writing requirement was necessary to ensure that the debtor obtained the protections offered under section 1692g(b)); *Savage v. Hatcher*, No. C-2-01-0089, 2002 WL 484986, at *4 (S.D. Ohio Mar. 7, 2002), *rev'd in part on other grounds at* 109 Fed. Appx. 759 (6th Cir. 2004) (inclusion of writing requirement is consistent with the legislative intent underlying the FDCPA); *Flowers v. Accelerated Bureau of Collections, Inc.*, No. 96 C 4003, 1997 WL 136313 (N.D. Ill. Mar. 19, 1997), *rev'd in part on reconsideration on other grounds*, 1997 WL 224987, *6 (N.D. Ill. Apr. 30, 1997) (to effectively "dispute the validity of a debt [or] verify a debt . . . the consumer must do so in writing"); *Morgovski v. Creditors Collection Serv. of S.F.*, No. C-92-0546-VRW, 1995 WL 316970, at *2-3 (N.D. Cal. May 16, 1995), *aff'd*, 92 F.3d 1193 (9th Cir. 1996) (District Court concluded that the only method of properly disputing a debt to trigger protection under the FDCPA was in writing); *Ingram v. Corporate Receivables, Inc.*, No. 02 C 6608, 2003 WL 21018650, at *6 (N.D. Ill. May 5, 2003) (following *Graziano*, the "rule of strict adherence to the statutory language yields when 'the literal

application of a statute will produce a result demonstrably at odds with the intentions of its drafters"); *Grief v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 217 F.Supp.2d 336, 340 (E.D.N.Y. 2002) (permitting debtors to dispute orally reduces the protections afforded to debtors by 1692g); *see also Fasten v. Zager*, 49 F.Supp.2d 144, 149 (E.D.N.Y. 1999) (letter suggesting that the debtor may orally dispute debt contradicted section 1692g's requirements that dispute must be made in writing).[4]

As the above lengthy analysis hopefully makes clear, Respondents' exercise of judgment to include the phrase "in writing" in their notice, particularly given the state of the law in their Circuit (*see, e.g., Savage v. Hatcher*, 109 Fed.Appx. 759 (6th Cir. 2004)), was perfectly understandable and defensible. It was certainly not a product of "ignorance." One court has considered the "Hobson's choice" presented to collectors like Respondents by the diverging interpretations of section 1692g(a)(3) at issue here, and concluded:

> It is easy to imagine that if [the debt collector] had sent another consumer-debtor

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[4] The CAC does not mean to suggest that all courts, or even the majority of courts, followed *Graziano*. There are likely an equal, or perhaps greater number, of courts which have held that the inclusion of the words "in writing" violates the FDCPA.

> a collection letter that did not state that dispute messages should be in writing, the recipient of that letter could have sued him for failing to include that statement. That plaintiff would argue that the debt collector had an obligation to state expressly that the message should be in writing in order to give fair notice of what action is required to dispute the debt and to be consistent with *Graziano*. In fear of such a claim, a debt collector who is aware of *Graziano* might reasonably decide to include the writing requirement, as [the debt collector] did in this case.

Castillo v. Carter, No. IP 99-1757-C H/G, 2001 WL 238121, at *12 (S.D. Ind. Feb. 28, 2001).[5]

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[5] Examples of other conflicting legal interpretations of the FDCPA between circuits, between district courts, and even between courts within the same courthouse abound. For example, the question of whether and when a debt collector who leaves a message on a cell phone or answering machine must identify himself as a debt collector under 15 U.S.C. section 1692d(6) and state that he or she is attempting to collect a debt under 15 U.S.C. section 1692e(11) is another such recent issue where the courts disagree. *Compare Foti v. NCO Financial Systems, Inc.*, 424 F.Supp.2d 643, 669 (S.D.N.Y. 2006) (debt collector violated the FDCPA when he left a voice mail message and did not identify himself as a debt collector) *with Biggs v. Credit Collections, Inc.*, No. CIV-07-0053-F, 2007 WL 4034997, at *4 (W.D. Okla. Nov. 15, 2007) (debt collector did not violate the FDCPA by leaving a voicemail message that did not contain certain disclosures because the voice mail message was not a communication); *Fashakin v. Nextel Communications*, No. 05-CV-3080 (RRM), 2009 WL 790350, at *7-8 (E.D.N.Y. Mar. 25,

(Continued on following page)

Thus, the bona fide error defense must be available to debt collectors that actively attempt to make an informed decision about the law and to comply with the FDCPA.

B. The Bona Fide Error Defense Should Be Available to Help Mitigate the Effect of Unanticipated Judicial Interpretation of the Law.

Clearly, a good faith basis existed for reasonable debt collectors, such as Respondents, after diligent research undertaken pursuant to established procedures, to exercise their judgment and determine that the phrase "in writing" should be included in the section 1692g(a)(3) admonition, so as to make it consistent with sections 1692g(a)(4), 1692g(a)(5) and 1692g(b).

In other words, the question becomes: Did Congress intend for a debt collector that is operating in good faith, to be held strictly liable, under these circumstances?

The answer, based on the language of the statute itself, and the purposes behind the statute, is plainly

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2009) (defendant *does not* violate the FDCPA by not disclosing the nature of its calls (*i.e.*, debt collection), when communicating and leaving messages with an employer).

"no." As the Senate Report observes: "A debt collector has no liability however if he violates the act *in any manner*, including with regard to the act's coverage when such violation is unintended and occurred despite procedures designed to avoid such violations." S. Rep. No. 95-382, at 5 (1977). As persuasively stated by one District Court:

> The court doubts that Congress meant to impose liability on debt collectors who do not correctly anticipate the ultimate resolution of such issues that have divided the federal courts in ways that could trigger strict liability in either direction.

Castillo, 2001 WL 238121, at *4 n.1.

"[I]f an attorney acting in good faith exercises an honest and informed discretion . . . the failure to anticipate correctly the resolution of an unsettled principle does not constitute culpable conduct . . . . In short, the exercise of professional judgment rests upon considerations of legal perception and not prescience." *Davis v. Damrell*, 119 Cal.App.3d 883, 889, 174 Cal.Rptr. 257 (1981).

Under these circumstances, courts across the country have correctly held that the bona fide error defense must be available in such instances and, as such, have applied the defense to these types of "errors of law." *See, e.g., Johnson v. Riddle*, 305 F.3d 1107, 1121-24 (10th Cir. 2002) (lawyer's attempts to

collect $250.00 charge while a violation of state law, was nonetheless subject to bona fide error defense); *Jenkins v. Heintz*, 124 F.3d 824, 834 (7th Cir. 1997); *Frye v. Bowman, Heintz, Boscia, Vician, P.C.*, 193 F.Supp.2d 1070, 1085-87 (S.D. Ind. 2002) (lawyer's practice based upon state court acquiescence in procedure was bona fide error); *Knight v. Schulman*, 102 F.Supp.2d 867, 873-75 (S.D. Ohio 1999) (violation of FDCPA arising from actions that ostensibly comported with apparently controlling state law constitutes proper basis for asserting bona fide error defense, even if the law subsequently changes); *Taylor v. Luper, Sheriff & Niedenthal Co., L.P.A.*, 74 F.Supp.2d 761, 765 (S.D. Ohio 1999) (lawyer's reasonable belief that Ohio state law permitted attorney fees to be added to a debt was subject to the bona fide error defense); *Watkins v. Peterson Ent., Inc.*, 57 F.Supp.2d 1102, 1107 (E.D. Wash. 1999) (collector's additional charges were ruled violation of FDCPA, though permitted by state courts, and held bona fide error); *Jenkins v. Union Corp.*, 999 F.Supp. 1120, 1141 (N.D. Ill. 1998) (attorneys' attempt to collect client's $25.00 service charge was bona fide error); *Castillo,* 2001 WL 238121, at *4 n.1; *accord Heintz v. Jenkins*, 514 U.S. 291, 295-96 (1995) (attorneys are debt collectors under the FDCPA and bona fide error applies to them); J. Flaccus, *FDCPA: Lawyers and The Bona Fide Error Defense*, 2001 Ark. L. Notes, 95, 97 (2001) (reviewing cases and finding bona fide error defense often permitted when the controlling state legal authority is unclear, or unsettled).

IV. The Bona Fide Error Defense Should Be Available in All Circumstances When the Debt Collector Can Prove a Bona Fide Error of Law.

This case involves Respondents' good faith interpretation as to the requirements of the FDCPA itself, yet that is not the only "mistake of law" to which the bona fide error defense may apply. While in her brief she primarily focuses on the misinterpretation of the FDCPA itself, Petitioner also argues that the bona fide error defense should not be available for any other legal error. The "question presented" by Petitioner is very broad and is not limited to legal errors based on the interpretation of the requirements of the FDCPA. Petitioner spends the last three pages of her brief arguing that the Court should make a broad rule instead of articulating a narrow rule based on the facts of the case at hand. In contrast, the United States, in its *amicus curiae* brief, presents a much narrower question: "Whether [the bona fide error defense] applies to a violation of the FDCPA that results from a debt collector's incorrect interpretation of the statute." Brief of the United States, p. 1.

The CAC respectfully submits that these are very different questions to which a one-size-fits-all analysis is not appropriate. In an effort to illustrate this point, the CAC provides a brief analysis of selected cases from across the country that have found the FDCPA's bona fide error defense applies to legal errors.

A. *Johnson v. Riddle* Correctly Applied the Bona Fide Error Defense to an Error of Law Arising From a Good Faith Interpretation of a Previously Unconstrued State Statute.

In *Johnson v. Riddle*, *supra*, the plaintiff brought an action against a collection attorney, Jessie Riddle, who had attempted to collect a $250 "penalty" from Ms. Johnson, in addition to the face amount of the bad check she had written. The penalty was arguably permitted under Utah law but the Tenth Circuit determined the extra amount sought in the form of the "penalty" constituted a violation of the FDCPA. Nevertheless, the Tenth Circuit found that the bona fide error defense could be asserted by the attorney – as a complete defense. *Johnson*, 305 F.3d at 1111. Consequently, the Tenth Circuit remanded for a determination as to whether the attorney could prove the three elements of the defense. The *Johnson* Court wrote as follows:

> . . . the plain language of the FDCPA suggests no intent to limit the bona fide error defense to clerical errors. To the contrary, § 1692k(c) refers by its terms to any "error" that is "bona fide." We find no indication in the legislative history that Congress intended this broad language to mean anything other than what it says. Indeed, to the extent that the legislative history speaks to this issue, it suggests that the narrow reading advocated by Johnson is incorrect. In describing the bona fide error exception, the

> Senate Report stated: "A debt collector has no liability, however, if he violates the act *in any manner*, including with regard to the act's coverage, *when such violation is unintentional* and occurred despite procedures designed to avoid such violations." S. Rep. No. 95-382, at 5 (emphasis added).

Id. at 1123.

The Tenth Circuit's analysis of the FDCPA's bona fide error defense to an attorney's good faith mistake of law relied upon language from this Court in *Heintz v. Jenkins, supra*. The *Johnson* Court wrote:

> Our conclusion is bolstered by the Supreme Court's reasoning in *Heintz*, 514 U.S. at 295. . . . *The Court apparently believed that the bona fide error defense would apply in at least a portion of the cases where the lawyer brought suit to collect an amount beyond that legally owed by the debtor. This reasoning at least suggests that the defense is available for mistakes of law*, because presumably mistakes of law may contribute to the reasons why some of the underlying debt collection procedures are lost.

Id. at 1123 (emphasis added).

The *Johnson* Court concluded its analysis as follows:

> [A]bsent a clearer indication that Congress meant to limit the defense to clerical errors,

> we instead adhere to the unambiguous language of the statute as supported by the available legislative history.

Id. at 1123-24 (footnote omitted).

In sum, the Tenth Circuit Court of Appeals in *Johnson* found the bona fide error defense was properly available to collection attorneys as an affirmative defense to liability stemming from their innocent mistakes of law. A lawyer-debt collector, like other collectors, generally, can innocently commit an "error" when he or she mistakenly sues for a fee or charge beyond that legally owed by the debtor. *Id.* at 1123, 1125.

B. *Jenkins v. Heintz* Correctly Applied the Bona Fide Error Defense to Incorrect Legal Positions.

In *Jenkins v. Heintz*, 124 F.3d at 824, the U.S. Court of Appeals for the Seventh Circuit addressed the applicability of the FDCPA's bona fide error defense to attorneys who err, mistakenly seeking a remedy on behalf of their creditor clients. *Jenkins* involved a debtor who failed to make payments on a car that she had purchased which was repossessed and eventually sold at auction. The defendants were collection lawyers who sued Jenkins to recover the deficiency.

Jenkins countersued the lawyers in federal court under the FDCPA. Jenkins claimed that the original

creditor had charged an amount in excess of the amount still owed, and that the lawyers knew, or should have known this when they attempted to collect the deficiency.

The attorney defendants asserted the bona fide error defense. Plaintiff argued that the defense did not apply to errors of law or legal judgment by attorney debt collectors. Rejecting this position, the District Court found the bona fide error defense applied, and plaintiff appealed.

The Court of Appeals in *Jenkins* cited the *Johnson* analysis with approval. Moreover, the Court flatly rejected the plaintiff's effort to analogize the bona fide error defense of the FDCPA to that found in the TILA, as Petitioner attempts to do here. *Jenkins,* 124 F.3d at 832 n.7.

The Court noted that applying the bona fide error defense to attorney debt collectors would not undermine the purposes of the statute:

> Filing suit, as defendants did here, should not give lawyers dispensation from the FDCPA; the law still applies to them. And it does not hold them to a different standard. The Act reads that debt collectors are not liable for attempting to collect validly certified amounts owed their client. It does not say that the collector's status as an attorney should add a requirement of independent legal analysis for each aspect of the creditor's claim. . . . To interpret the FDCPA as not to treat lawyers and debt

> collectors equally would contort the statute's meaning, and ignore Congress' drafting and the Supreme Court's interpretation. . . . Lawyers meet the definition of debt collectors, even while litigating; thus the same standards apply to "attorney debt collectors" as apply to other debt collectors.

Jenkins, 124 F.3d at 833-34.

In sum, the *Jenkins* Court's analysis concludes that attorney debt collectors must be held *to the same standards with other* debt collectors under the FDCPA, and thus must have available the same defenses – including the bona fide error defense.

C. *Frye v. Bowman* Correctly Applied the Bona Fide Error Defense to an Error of Law Arising From the Use of a Form Summons Published by the State Courts Upon Which the Collectors Relied.

In *Frye,* the plaintiffs asserted a class action against attorney debt collectors alleging that the summonses the lawyer had served on consumers in debt collection lawsuits violated the FDCPA *because the summons misstated the law. Frye*, 193 F.Supp.2d at 1089. The plaintiffs further contended that because the defendants had *committed a mistake of law*, the FDCPA's bona fide error defense did not apply. However, the District Court rejected this argument and instead found that the bona fide error defense

applied to the collection lawyer's "reasonable" mistake of law.

The *Frye* Court found it significant that the defendant attorneys there had relied upon forms that had been published by the Indiana Superior Courts and the Indiana Supreme Court, for use as a template from which to model other summonses, including the ones in question. *Id.* at 1086. The *Frye* Court found the Indiana court's "tacit approval" of the defendant attorney's legal interpretation of Indiana law as set forth in their summonses to be sufficient to raise the bona fide error defense:

> Thus, Bowman has produced uncontradicted evidence that the language challenged by the Fryes in its Summonses was consistent with language in the summons forms available from state court clerks' offices submitted in this case. As a result, the alleged defects or mistakes in the Summonses were tacitly approved by the state court clerks. Following the reasoning of *Watkins* and *Baker's* implication that mistakes of law may in some circumstances entitle a debt collector to the defense, the court finds that Bowman is entitled to raise the bona fide error defense to the alleged violations of the FDCPA, provided Bowman proves the violations were unintentional and the maintenance of procedures reasonably adapted to avoid such errors. This conclusion is consonant with the Supreme Court's indication in *Heintz v. Jenkins* that the FDCPA's provisions should be read in such a way as to avoid anomalies

> in lawyers' litigation activities. *See* 514 U.S. at 296-97, 115 S.Ct. 1489. . . .

Id. at 1086-87.

As noted by the *Frye* Court, it would be troubling to hold a debt collector liable for misstatements of law when the collector committed the mistake by relying on court sanctioned language.

D. *Watkins v. Peterson Enterprises* Correctly Applied the Bona Fide Error Defense to an Error of Law Arising From Procedural Errors in Garnishments Ratified by State Courts.

In *Watkins*, *supra*, the plaintiffs brought an FDCPA action against a collection agency for violation of sections 1692e and 1692f. The plaintiffs asserted the agency, through its attorneys, was not permitted to seek, much less recover, costs and attorneys' fees associated with the filing of either (1) writs of garnishment or (2) pay orders. The defendants raised the defense of bona fide error, submitting "an affidavit stating not only that its collection practices were based upon advice of counsel, but *they were accepted by courts throughout the state*." *Watkins*, 57 F.Supp.2d at 1107 (emphasis added).

The Court began its analysis of the pay order issue with an analysis of the decision in *Baker v. G.C. Services*, 677 F.2d 755 (9th Cir. 1982), the ostensibly

controlling Ninth Circuit authority. In the Court's own words:

> Peterson's effort to invoke § 1692k(c) faces a significant obstacle. As the plaintiffs point out, "[r]eliance on advice of counsel or a mistake about the law is insufficient by itself to raise the bona fide error defense. . . .
>
> Peterson submits the plaintiffs are wrong in asserting that a mistake of law can never constitute a bona fide error. According to Peterson, the fact the *Baker* decision twice employs the phrase "by itself" is significant. To Peterson's way of thinking, the Circuit Court's repeated use of that phrase implies there are circumstances in which a mistake of law can constitute a bona fide error. This is such a case, Peterson insists. . . .
>
> Peterson has a point. . . . This, then, is not a situation in which an unlawful practice occurred solely as a result of a debt collector's mistaken view of the law. . . . As a result, *Baker* is not controlling.

Watkins, 57 F.Supp.2d at 1107-08.

The court in *Watkins* ultimately concluded that: "*Baker* is not controlling" and applied the bona fide error defense.[6] *Id.* at 1108.

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[6] Of note, however, the Court refused to immunize defendant's collection of fees associated with unsuccessful writs by application of the bona fide error defense. The Court

(Continued on following page)

The *Watkins* Court applied the bona fide error defense to mistakes of law arising from a collector's reliance on procedures required by state courts. This holding is consistent with the legislative history and expressed Congressional intent underlying the FDCPA's bona fide error defense.

E. *Taylor v. Luper* Correctly Applied the Bona Fide Error Defense to an Error of Law Arising From a Divergence in How State Courts Interpreted State Law.

In *Taylor, supra,* the plaintiffs alleged that the defendant attorneys had violated the FDCPA by attempting to collect attorney's fees upon a judgment. The plaintiffs claimed that recovery of attorney's fees by a creditor was not permitted under Ohio law and, as a result, the attorneys had violated section 1692f(1) of the FDCPA.

Initially, the District Court directed its attention to the public policy issues implicated if it accepted the proposition that the FDCPA's bona fide error provision applied only to mere clerical mistakes.

---

explained that no "state court ever rule[d] that Peterson was entitled to such fees." *Watkins*, 57 F.Supp.2d at 1107. In a footnote, the Court recognized that judgments that support the attorney's position and bona fide belief are particularly relevant to the bona fide error defense.

> Under plaintiffs' view, the bona fide error defense could never be invoked by a lawyer who, in good faith, asserted a claim on behalf of a client if a court later ruled that all or part of the claim was unfounded. Under plaintiffs' view, the lawyer would be strictly liable under the FDCPA because the lawyer made a false representation of the character, amount or legal status of the debt, a violation of § 1692e(2)(A) of the Act, or because the lawyer attempted to collect an amount which was not permitted by law, a violation of § 1692f(1) of the Act. If plaintiffs' view is correct, the FDCPA poses serious problems for lawyers.

Taylor, 74 F.Supp.2d at 764-65.

> The District Court noted:
>
> Here, the mistake of law relied upon to invoke the bona fide error defense was not a mistake about the requirements of the FDCPA itself. It was instead a mistake about whether the collection of a certain fee, charge or expense incidental to the principal obligation, attorneys fees, was permitted under the law of the state of Ohio.

Id. at 765.

In holding that the attorney had established the bona fide error defense, the Court noted: "[L]awyers should not be held strictly liable when they discharge their ethical duty to a client by asserting in good faith

a claim which is ultimately rejected by a court." *Id.* at 765.

The foregoing cases demonstrate the variety of bona fide legal errors that may arise in the context of debt collection. Good faith mistakes of law are not limited to incorrect interpretations of the FDCPA, nor should the bona fide error defense be so limited.

CONCLUSION

In sum, good faith legal errors may arise in a variety of contexts. The error may arise, as it did here, with respect to the requirements of the FDCPA itself. The errors may also arise based on a good faith misinterpretation of state law. The inadvertent error may have been a standard industry practice that is attacked as a violation of the FDCPA for the first time. Or the inadvertent error may have been explicitly or implicitly approved by other state or federal courts.

In every instance, the bona fide error defense requires a fact intensive inquiry with respect to collector's procedures designed to prevent errors and with respect to the unintentional nature of the violation. The burden of proof rests on the collector asserting the defense. Inclusion of legal errors under the framework of the bona fide error defense does not diminish the effectiveness of the FDCPA or limit its protections to consumers. However, a blanket rule of law holding that a legal error can never be the basis for the bona fide error defense leaves debt collectors, such as Respondents here, in an impossible situation and competitively disadvantaged. *Compare* 15 U.S.C. § 1692(e).

For all of the forgoing reasons, *amicus curiae,* the California Association of Collectors, respectfully submits that the ruling of the Sixth Circuit below should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 08-1200

IN THE

Supreme Court of the United States

KAREN L. JERMAN,

Petitioner,

v.

CARLISLE, MCNELLIE, RINI, KRAMER & ULRICH LPA, *ET AL.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE COMMERCIAL LAW LEAGUE OF AMERICA AND DBA INTERNATIONAL AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether a debt collector's legal error qualifies for the *bona fide* error defense under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692k(c).

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INTERESTS OF THE AMICI CURIAE[1]

The Commercial Law League of America (CLLA) was founded 1895 and is the oldest creditors' rights organization in the United States. Today the CLLA is an international organization of attorneys, commercial collection agencies, and other experts in credit and finance actively engaged in the fields of commercial law and bankruptcy and reorganization. Through its representatives, the CLLA has testified before Congress on numerous occasions, and the League has provided expert testimony in the fields of collections and bankruptcy and reorganization. The League has appeared as *amicus curiae* before this and other federal courts in a number of cases, including *Heintz v. Jenkins*, 514 U.S. 291, 115 S.Ct. 1489, 131 L.Ed.2d 395 (1995). The vast majority of the League's membership represents credit grantors in collection disputes, and the Court's ruling in this case will have a significant impact on the League's members and their clients.

This case concerns the interpretation of an affirmative defense to liability under the Fair Debt Collection Practices Act (FDCPA or Act), 15 U.S.C. § 1692 *et seq.* CLLA has a substantial interest in the correct interpretation of the *bona fide* error provision of the FDCPA as its members are attorneys who litigate

---

[1] The parties have consented to the filing of *amici* briefs. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

collection cases in every state and territory of the United States. Denial of a *bona fide* legal error defense to attorneys impairs the ability of CLLA member attorneys to represent their clients as zealous advocates.

DBA International (DBA) is a non-profit corporation which serves as the principal nationwide trade group for collection industry members who specialize in the purchase of "charged-off" debts. DBA's 502 member firms are dedicated to building a professional, ethical, and compliant market for delinquent receivables. The membership of the DBA includes debt buyers, collection agencies, collection attorneys and investors from across the United States who collect consumer debts both directly and indirectly through lawful collection techniques, including litigation, in an effort to collect debts that they have purchased from credit grantors or other debt sellers.

DBA has a substantial interest in the correct interpretation of the *bona fide* error provision of the FDCPA as the position proposed by Petitioner impairs the ability of DBA members to secure legal representation and adequate access to the courts.

SUMMARY OF ARGUMENT

It has been said that the "classic role of an *amicus curiae* is to assist in a case of general public interest, to supplement the efforts of counsel, and to draw the court's attention to law that might otherwise escape consideration." Moore's Federal Practice - Civil § 329.11 (Matthew Bender 3d ed.). The parties have briefed the

history and text of the FDCPA, and the *amici* will not waste the Court's time by restating that information; rather, this brief will be confined to four arguments.

1. This is not a case, as Petitioner suggests, of ignorance of the law being no excuse. Instead, this is a case invoking the fundamental duty of attorneys to select the law which most favors and applies to their clients' issues when the law is unsettled or a split of authority exists, which is what occurred in the instant case. At the time of the conduct giving rise to this litigation the Sixth Circuit Court of Appeals had not ruled on the propriety of including "in writing" in the disclosure required by 15 U.S.C. § 1692g(a)(3). However, the Third Circuit Court of Appeals had expressly *permitted* the inclusion of "in writing," and while the Ninth Circuit subsequently rejected that decision, the Third Circuit decision remains valid to this day. Creating liability under the circumstances presented will chill the ability of creditors to secure the development of case law and the ability of collection attorneys to secure clarification of their clients' rights and their own obligations under the FDCPA.

2. The wording of the FDCPA is simply inconsistent with the interpretation offered by Petitioner. Congress chose to provide a *bona fide* error defense when a "violation" is "unintentional." Petitioner's proposed interpretation effectively seeks to substitute the word "conduct" for the word "violation" in order to have the Act interpreted as she proposes. Such an approach is inconsistent with the rules of legislative construction.

3. Petitioner's suggestion that *bona fide* legal error is unnecessary because of the availability of the FTC Opinion Letter defense set forth in 15 U.S.C. 1692k(e) is a "red herring" argument. Although theoretically available, that defense is in reality unavailable in virtually all situations.

4. The consequences of this Court's decision in *Heintz v. Jenkins*, 514 U.S. 291, 115 S.Ct. 1489, 131 L.Ed.2d 395 (1995) has been the abrogation in FDCPA cases of fundamental doctrines such as witness immunity, litigation immunity and the *Noerr-Pennington* doctrine. Allowing the interpretation favored by Petitioner would further erode these well-established defenses and thus the access of creditors to effective legal representation and to the courts.

ARGUMENT

The FDCPA provides a statutory scheme regulating, at a national level, the activities of individuals and businesses (including attorneys and law firms) engaged in the collection of defaulted consumer debts. Section 813 of the Act, 15 U.S.C. § 1692k allows consumers the ability to bring individual and class actions under the Act, effectively serving as "private attorneys general" to right the wrongs that the state and federal governments do not have the time, inclination, or resources to address. *Graziano v. Harrison*, 950 F.2d 107 (3d Cir. 1991).

Although it is a strict liability statute the Act provides a defense to a debt collector who shows by a preponderance of evidence that a violation was not

intentional and resulted from a *bona fide* error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error. Decisions from multiple appellate courts have recognized that this *bona fide* error is not limited merely to clerical mistakes. CLLA and DBA urge the Court to recognize the availability of the defense in the case of *bona fide* legal errors.

1. Respondents' actions did not evidence ignorance of the law; rather, they chose to follow existing case law which had not been rejected in their circuit.

15 U.S.C. § 1692g(a) requires that within five days of a debt collector's initial communication with a consumer the debt collector must provide the five disclosures commonly known as the "validation notice." Section 1692g(a)(3) states that one of the required disclosures is

> a statement that unless the consumer, within 30 days after receipt of the notice, disputes the validity of the debt or any portion thereof, the debt will be assumed to be valid by the debt collector

Section 1692g(a) (4) and (5) also mandate disclosures to consumers offering to provide certain information if the consumer makes a written dispute or request within thirty days of receipt of the validation notice. Unlike Section 1692g(a) (3), which is silent as to the requirement of a writing, Section 1692g(a) (4) and (5) each expressly require a consumer's dispute or request to be in writing in order to be effective.

In *Graziano v. Harrison*, 950 F.2d 107 (3d Cir. 1991) the Court of Appeals was confronted with a collection attorney's notice which stated that he would presume the debt to be valid unless the debtor disputed the debt in writing. The Third Circuit held that the attempt to require a written dispute to avoid the presumption of validity was not a violation of section 1692g, notwithstanding the fact that Section 1692g(a)(3) does not use the words "written" or "in writing."

> Adopting Graziano's reading of the statute would thus create a situation in which, upon the debtor's non-written dispute, the debt collector would be without any statutory ground for assuming that the debt was valid, but nevertheless would not be required to verify the debt or to advise the debtor of the identity of the original creditor and would be permitted to continue debt collection efforts. We see no reason to attribute to Congress an intent to create so incoherent a system. We also note that there are strong reasons to prefer that a dispute of a debt collection be in writing: a writing creates a lasting record of the fact that the debt has been disputed, and thus avoids a source of potential conflicts. We therefore conclude that subsection (a)(3), like subsections (a)(4) and (a)(5), contemplates that any dispute, to be effective, must be in writing. The district court was not in error in determining that the requirement of a writing did not render the statutory notice invalid.

Graziano at 112.

Other courts, however, have reached a contrary conclusion and forbidden the imposition of a writing requirement to avoid the assumption of validity. *See, e.g., Camacho v. Bridgeport Fin., Inc.*, 430 F.3d 1078 (9th Cir. 2005); *Brady v. Credit Recovery Co.*, 160 F.3d 64 (1st Cir. 1998). Nevertheless, the Third Circuit Court of Appeals has not, to this day, disaffirmed the holding in *Graziano*.

CLLA and DBA will readily concede that the outcome in *Camacho* is more consistent with the express wording of the FDCPA. The inclusion of the words "in writing" and "written request" in Section 1692g(a)(4) and (5) and the omission of such words in Section 1692g(a)(3) is indicative of a Congressional intent that there be a distinction in the obligations imposed upon consumers to invoke their rights. At least one treatise has acknowledged the superiority of the Ninth Circuit's reasoning. *See* M. Newburger and B. Barron, *Fair Debt Collection Practices: Federal and State Law and Regulation*, ¶ 1.05[1][i] (A.S. Pratt & Sons 2002-2009). The merit of Plaintiff's underlying claim, however, is not the issue which is of concern to these *amici*.

Courts have repeatedly stated that the FDCPA is a strict liability statute. *See, e.g., Russell v. Equifax ARS*, 74 F3d 30 (2d Cir. 1996); *Taylor v. Perrin, Landry, deLaunay & Durand*, 103 F.3d 1232, 1238-39 (5th Cir. 1997); *Clark v. Capital Credit & Collection Servs., Inc.*, 460 F.3d 1162 (9th Cir. 2006). ("§ 1692e applies even when a false representation was unintentional"); *Gearing v. Check Brokerage Corp.*, 233 F.3d 469, 472 (7th Cir. 2000) (holding unintentional misrepresentation of debt

collector's legal status violated FDCPA). *See also Turner v. J.V.D.B. & Assocs., Inc,* 330 F.3d 991, 995 (7th Cir. 2003) (holding unintentional misrepresentation that debtor was obligated to pay a debt discharged in bankruptcy violated FDCPA). Whether or not *Camacho* was the better-reasoned decision *Graziano* remains good law in the Third Circuit. Petitioner's position would make Respondents strictly liable for their loss in asserting a position already decided in their favor by at least one federal appellate court. Ironically, Petitioner asks this Court to resolve a split in authority between Circuits, but she would deny to Respondents the ability to seek similar relief without facing strict liability for being wrong.

Choosing to follow the Third Circuit and then having the Sixth Circuit choose to follow the Ninth Circuit can hardly be characterized as "ignorance of the law" as suggested by Petitioner. This is not a situation such as *Johnson v. Riddle*, 305 F.3d 1107 (10th Cir. 2002), in which there was no appellate authority on which the collection attorney attempted to base a *bona fide* legal error defense. In *Johnson* the collection attorney's reliance upon a few unappealed test cases that he had filed was the basis of his *bona fide* error defense. In contrast, regardless of whether this Court agrees with the holding in *Graziano*, Respondents' actions were consistent with a published decision of a federal appellate court which had not been disaffirmed by that court nor rejected in their own circuit.

If this Court rejects the application of the *bona fide* error defense under such circumstances creditors' attorneys will become a special class of disadvantaged

lawyers who will be able to follow only decisions which are least advantageous to their firms and clients, even when there is contrary legal authority to support different conduct. Even in the face of *Graziano*, a collection attorney practicing law inside the Third Circuit would be subjected to FDCPA liability for relying upon a decision of that Court of Appeals merely because another court has reached a different outcome. CLLA and DBA respectfully assert that such a rule of law should not be tolerated. Although they believe that the Court below ruled correctly on the *bona fide* legal error defense, should this Court decide otherwise CLLA and DBA urge the Court to consider a narrower ruling to recognize, at a minimum, the applicability of the *bona fide* error defense to a debt collector's reliance upon case law which has not been rejected in the debt collector's jurisdiction.

2. The text of the FDCPA's *bona fide* error provision mandates the conclusion that it is the "violation" and not the conduct which must be unintentional.

The text of 15 U.S.C. 1692k(c) provides:

> (c) Intent
>
> A debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponder-ance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

When a statute's language is plain, "the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6, 147 L. Ed. 2d 1, 120 S. Ct. 1942 (2000); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241, 103 L. Ed. 2d 290, 109 S. Ct. 1026 (1989); *Caminetti v. United States*, 242 U.S. 470, 485, 61 L. Ed. 442, 37 S. Ct. 192 (1917). When the words of a statute are unambiguous "judicial inquiry is complete." *Rubin v. United States*, 449 U.S. 424, 430, 66 L. Ed. 2d 633, 101 S. Ct. 698 (1981).

Amici submit that there is no justification for disregarding the plain wording of the Act even if the Court agrees with Petitioner's concerns about the consequences of ruling in favor of Respondents. Given a choice between effecting an undesirable outcome or disregarding the express wording of an unambiguous statute, the Court should neither enlarge nor restrict the effect of the Congressional Act. *See Iselin v. United States*, 270 U.S. 245, 251, 46 S. Ct. 248, 70 L. Ed. 566 (1926); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625, 98 S. Ct. 2010, 56 L. Ed. 2d 581 (1978). The rationale for this policy is that this Court traditionally grants deference to "the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill." *United States v. Locke*, 471 U.S. 84, 95, 105 S. Ct. 1785, 85 L. Ed. 2d 64 (1985), *citing Richards v. United States*, 369 U.S. 1, 9, 82 S. Ct. 585, 7 L. Ed. 2d 492 (1962).

Federal courts have repeatedly recognized that the *bona fide* error defense can be triggered when the

violation is unintentional, even if the conduct giving rise to the violation was intentional. *Lewis v. ACB Bus. Servs.*, 135 F.3d 389 (6th Cir. 1998), *reh. en banc denied*, 1998 U.S. App. LEXIS 7698 (6th Cir. 1998); *Nielsen v. Dickerson*, 307 F.3d 623, 641 (7th Cir. 2002); *Kort v. Diversified Collection Servs.*, 394 F.3d 530 (7th Cir. 2005) Such an interpretation is necessary in order to give any meaning to the defense.

In the context of the law of trespass one might well have a meaningful discussion of whether the relevant intent should be the intent to enter upon property or to commit a trespass. However, in the debt collection context such distinctions have no meaning. A debt collector does not ordinarily send a letter, place a call, or speak words "unintentionally." If it is the collector's conduct which must be "unintentional" then there are virtually no circumstances under which the defense will apply as the "procedures reasonably adapted" requirement would make it necessary to have a procedure of never calling or writing a consumer in order to invoke the defense.

For collection attorneys the problem is even worse. Attorneys do not ever "unintentionally" file pleadings; indeed, they are forbidden to do so. *See, e.g.*, Fed. R. Civ. P. 11. Given the strict liability nature of the FDCPA, the *bona fide* error defense would ***never*** be available to a collection attorney in the case of a pleadings-based FDCPA claim because the filing of pleadings simply is not unintentional. Petitioners' construction of the Act would deny the defense to attorneys. Such an outcome will chill the ability of creditors to secure access to the courts. In the case of debt buyers it subjects every debt

buyer to the potential of vicarious liability for the actions of its attorneys.

Although 15 U.S.C. § 1692a(6) exempts creditors from the definition of "debt collector," debt buyers who purchase debts after default do not enjoy the benefits of that exemption and they are treated as "debt collectors" for FDCPA purposes. *See, e.g., Pollice v. Nat'l Tax Funding LP*, 225 F.3d 379, 403–404 (3d Cir. 2000); *Kizer v. Finance Am. Credit Corp.*, 454 F. Supp. 937 (N.D. Miss. 1978); *Holmes v. Telecredit Corp.*, 736 F.Supp. 1289 (D. Del. 1990). *See also McKinney v. Cadleway Props., Inc.*, 548 F.3d 496 (7th Cir. 2008). Courts across the country have held that a debt collector may be held vicariously liable for the collection activities of attorneys working on its behalf. *See Fox v. Citicorp*, 15 F.3d 1507, 1516 (9th Cir. 1994); *Scally v. Hilco Receivables, LLC*, 392 F. Supp. 2d 1036, 1039 (N.D. Ill. 2005); *Caron v. Maxwell*, 48 F. Supp. 2d 932, 936 (D. Ariz. 1999); *Alger v. Ganick, O'Brien & Sarin*, 35 F. Supp. 2d 148, 153 (D. Mass. 1999); *Randle v. GC Servs.*, 25 F. Supp. 2d 849, 851 (N.D. Ill. 1998); *Ditty v. CheckRite*, 973 F. Supp. 1320, 1333 (D. Utah 1997); *Farber v. NP Funding II L.P.*, No. CV-96-4322, 1997 U.S. Dist. LEXIS 21245, 1997 WL 913335 (E.D.N.Y. Dec. 9, 1997); *Kimber v. Fed. Fin. Corp., supra.* If the Court adopts the construction favored by Petitioner and rules that it is the conduct and not the violation which must be unintentional, the *bona fide* error defense will not only cease to exist for collection attorneys but for their debt buyer clients also.

3. The defense set forth in 15 U.S.C. 1692k(e) for reliance on FTC opinion letters is illusory.

Petitioner asserts that a *bona fide* legal error defense is completely unnecessary because the FDCPA provides a form of such defense based upon formal FTC opinions. The private remedies Section of the Act, 15 U.S.C. § 1692k provides in pertinent part:

> (e) Advisory opinions of Commission. No provision of this section imposing any liability shall apply to any act done or omitted in good faith in conformity with any advisory opinion of the Commission, notwithstanding that after such act or omission has occurred, such opinion is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

In reality, the FTC opinion letter defense does not exist as the FTC has repeatedly refused to issue such opinions. The Federal Trade Commission is the federal agency charged with enforcement of the FDCPA. *See* 15 U.S.C. § 1692l. In the 32 and-a-half years since the FDCPA was enacted the FTC has issued 417 letters in response to requests for opinion letters. *See* http://www.ftc.gov/os/statutes/fdcpajump.sht; Robert J. Hobbs, *Fair Debt Collection, 647-64* (6th ed. 2008). However, only ***four*** of those letters have been formal advisory opinion letters that satisfy the requirements of 15 U.S.C. § 1692k(e) (one of which was obtained by the law firm which is filing this brief). In all other instances the FTC has avoided issuing a formal advisory opinion and issued instead a non-binding statement of

enforcement position which does not give rise to a defense under Section 1692l. Advisory opinions of the FTC are not entitled to deference in FDCPA cases except perhaps to the extent that their logic is persuasive. *Dutton v. Wolpoff & Abramson*, 5 F.3d 649, 654 (3d Cir. 1993). *Lewis v. ACB Bus. Servs.*, 135 F.3d 389, 399 (6th Cir. 1998); *Fox v. Citicorp Credit Servs., Inc.*, 15 F.3d 1507, 1513 n.4 (9th Cir. 1994).

The advisory opinion defense is dependent upon the whims of the FTC in deciding whether to issue such an opinion in a particular case and the politics of whether the Commission is willing to issue such opinions generally. Given the fact that in response to over 99% of the requests directed to it the Commission has failed or refused to provide an opinion that satisfies the Section 1692k(e) defense the Court should recognize that Petitioner's argument on this point is disingenuous.

4. Allowing the interpretation favored by Petitioner has the effect of limiting the access of creditors to effective legal representation and to the courts.

As is discussed above the FDCPA is a strict liability statute. In its *amicus curia* brief in *Heintz v. Jenkins*, 514 U.S. 291 (1995) CLLA expressed its concern that the consequence of making attorneys "debt collectors" under the FDCPA is that they would become the strictly liable insurers of the success of their client's cases. The FDCPA forbids misrepresenting the character or amount of a debt, 15 U.S.C. § 1692e(2)(A); therefore, an attorney who fails to secure a judgment for 100% of her client's claim faces the very real danger that she will be sued for misrepresenting the amount of the debt.

In *Heintz* this Court rejected such arguments, stating:

> Many of Heintz's "anomalies" are not particularly anomalous. For example, the Sixth Circuit pointed to § 1692e(5), which forbids a "debt collector" to make any "threat to take action that cannot legally be taken." The court reasoned that, were the Act to apply to litigating activities, this provision automatically would make liable any litigating lawyer who brought, and then lost, a claim against a debtor. *Green, supra*, at 21. But, the Act says explicitly that a "debt collector" may not be held liable if he "shows by a preponderance of evidence that the violation was not intentional and resulted from a *bona fide* error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." § 1692k(c). Thus, even if we were to assume that the suggested reading of § 1692e(5) is correct, we would not find the result so absurd as to warrant implying an exemption for litigating lawyers. In any event, the assumption would seem unnecessary, for we do not see how the fact that a lawsuit turns out ultimately to be unsuccessful could, by itself, make the bringing of it an "action that cannot legally be taken."

The questions during oral argument in *Heintz* suggested that this Court may have made the mistake of assuming that the lower courts would treat "good

faith" as relevant to the question of a collection attorney's ultimate liability under the FDCPA.

> Justice Breyer: "It would be helpful to me if you could go back to Justice O'Connor's question and list what would be in this chamber of horrors. I mean, I did feel that the brief had quite a few, what you called anomalies, but then when I went through the statute, it didn't seem they were quite so anomalous, and that's why I wonder which—what bad things will happen if it does cover attorneys? For example, the attorney would be liable if it turned out that the debt wasn't real, but there is a good faith exception, I gather, so that the attorney would be liable only when he didn't act in good faith.."

Transcript of Oral Argument for *Heintz v. Jenkins*, 1995 WL 117619, at *16 (Feb. 21, 1995).

However, in the intervening years the intermediate appellate courts have permitted (even created) the absurd results that this Court considered unlikely. In the context of FDCPA litigation courts have rejected well-established common law defense doctrines such as witness immunity,[2] *Todd v. Weltman, Weinberg & Reis Co., L.P.A.*, 434 F.3d 432 (6th Cir. 2006), litigation

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[2] Witness immunity serves the strong public interest in ensuring that witnesses will come forward to testify and that when they do so, they will not shade their testimony or tell less than the whole truth. *See Briscoe v. LaHue*, 460 U.S. 325, 103 S. Ct. 1108, 75 L. Ed. 2d 96 (1983).

immunity,[3] *Sayyed v. Wolpoff & Abramson*, 485 F.3d 226 (4th Cir. 2007), and the *Noerr-Pennington* doctrine.[4] *Hartman v. Great Seneca Fin. Corp.*, 569 F.3d 606 (6th Cir. 2009); *Sial v. Unifund CCR Partners*, 2008 U.S. Dist. LEXIS 66666, 2008 WL 4079281 (S.D. Cal. 2008). Even communications between attorneys have become the subject of actions permitted by the courts. *Evory v. RJM Acquisitions Funding L.L.C.*, 505 F.3d 769 (7th Cir. 2007). The tortured reasoning in *Evory* actually creates liability distinctions for debt collectors based upon how knowledgeable or competent a consumer's attorney is.

Creditors are as entitled to access to the courts as any other litigants. However, access to the courts requires access to legal representation. The elimination

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[3] The common law recognizes that "witnesses, prosecutors and other lawyers were absolutely immune from damages liability at common law for making false or defamatory statements in judicial proceedings (at least so long as the statements were related to the proceeding), and also for eliciting false and defamatory testimony from witnesses.". *Burns v. Reed*, 500 U.S. 478, 489-90, 111 S. Ct. 1934, 1941, 114 L. Ed. 2d 547, 560 (1991) "Absolute immunity is thus necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation." *Butz v. Economou*, 438 U.S. 478, 512, 98 S. Ct. 2894, 2913, 57 L. Ed. 2d 895, 919 (1978)

[4] The *Noerr-Pennington* doctrine derives from the Petition Clause of the First Amendment. Persons who petition any department of the government for redress are generally immune from statutory liability for their petitioning conduct. *See Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965).

of the aforesaid privileges leaves creditors as a unique class of litigants who are unprotected from the very dangers against which the privileges were intended to protect.

The problems presented by the lack of a *bona fide* legal error defense are most clear when one considers an issue as basic as the statute of limitations to sue on a debt. Case law has consistently held that it is a violation of the FDCPA to sue or threaten to sue on a time-barred debt. *See e.g., Kimber v. Federal Financial Corp.*, 668 F.Supp. 1480, 1488 (M.D. Ala. 1987); *Freyermuth v. Credit Bureau Services*, 248 F.3d 767 (8th Cir. 2001); *Parkis v. Arrow Financial Services, LLS*, 2008 U.S. Dist. LEXIS 1212, 2008 WL 94798, at *7 (N.D. Ill. 2008); *Ramirez v. Palisades Collection LLC*, 2008 U.S. Dist. LEXIS 48722, 2008 WL 2512679, at 5 (N.D. Ill. 2008). However, what is an attorney to do to protect the rights of her client when the statute of limitations on a debt is not certain?

This is not an obscure hypothetical situation. Credit card debts represent a substantial portion of the debts sued upon in the United States, and the majority of the debts purchased by DBA's members. In Georgia, the issue was only recently decided in *Hill v. American Express*, 289 Ga. App. 576; 657 S.E.2d 547 (Ga. App. 2008). In *Hill*, the consumer asserted that a credit card debt had to be treated as an action on an open account which would be subject to the four-year statute of limitations set forth in OCGA § 9-3-25. The creditor's attorney argued that a credit card account was a claim sounding in contract and therefore subject to the six- year statute of limitations set forth in OCGA § 9-3-24.

The Court of Appeals concluded that the position taken by American Express' attorney was the correct one; however, had the case turned out differently, the attorneys representing the creditor would have been subject to a suit under the FDCPA.

The certainty of this assertion can be found by considering the summary judgment rendered by the District Court in *Richburg v. Palisades Collections, LLC*, Civil Action 07-7 (E.D.Pa. Jan. 28, 2007). In *Richburg*, the defendants (a debt buyer and its attorneys) were sued in an FDCPA class action based upon the alleged filing of suits after the expiration of the applicable statute of limitations. The *Richburg* defendants had taken the position that a credit card debt could be sued as an open account (the very position taken by the ***consumer*** in *Hill*), and that such debts were subject to the six-year limitations period provided for in 42 Pa. Con. Stat. Ann. § 5527(b). Richburg argued that a credit card debt must be treated as a contract action subject to the four-year limitations period set forth in 42 Pa. Con. Stat. Ann. § 5525(a)(1)

The District Court in *Richburg* sided with the plaintiff, concluding that the contract statute of limitations applied to the underlying collection efforts. That court held, as a matter of law, that the defendants had violated the FDCPA by filing suit under the account stated theory, even though no appellate court in Pennsylvania had ever determined this limitations issue.

The *Richburg* Court denied the defendants summary judgment on their *bona fide* legal error defense but at least recognized the availability of the

defense, leaving it to the jury to determine if the defense was available. Had that court taken the position asserted by Petitioner the defendants in that case would have been left with no way to seek a determination of the applicable statute of limitations without incurring strict liability under the FDCPA in the event of a loss.[5]

The debt collectors in *Richburg* took the same legal position *vis-à-vis* limitations that the consumer had taken in *Hill*, and the consumer plaintiff in *Richburg* took the same position taken by the debt collector in *Hill*. There is no consequence to the consumer bar for taking inconsistent legal positions in different jurisdictions in order to make law. However, if this Court adopts the position taken by Petitioner then no collection attorney will be able to engage in the same sort of advocacy for his or her client, and no retail creditor will have the ability to secure experienced counsel to advocate for the limitations period which it believes to be correct. Petitioner would create two classes of litigants – consumer debtors, who would have unfettered access to counsel and the courts and retail creditors,

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[5] Credit cards are not the only type of debt for which the statute of limitations has been problematic. In the last forty-five days the United States District Court for the Northern District of Texas ruled on the complex issues inherent in the statute of limitations applicable to to cell phone bills, granting summary judgment to a collection agency and a debt buyer. *Castro v. Collecto, Inc,*, 2009 U.S. Dist. LEXIS 99703 (W.D. Tex. Oct. 27, 2009). Had that court ruled differently, Petitioner's interpretation of the *bona fide* error defense would have left the defendants in *Castro* strictly liable for asserting a legal position where the law was unsettled. Imdeed, that is precisely what the plaintiff Castro attempted to accomplish.

whose access to the courts would be hampered by the chilling effect of strict liability for their attorneys when courts disagree with their legal positions. The role of the attorney as a zealous advocate recognized in ABA Model R. of Prof'l Conduct, Preamble (2004) will cease to exist in collection cases as zealous advocacy will be suppressed by the FDCPA. *How can an attorney zealously advocate when the consequence of being wrong is strict liability for his client's lack of success?* Such a consequence only serves to chill effective legal representation.

Had the intermediate appellate courts heeded this Court's caution in *Heintz* to avoid absurd results this situation might not exist. However, in light of the elimination of witness immunity, litigation immunity, and the *Noerr-Pennington* doctrine as defenses to FDCPA suits creditors and their attorneys must be fearful of incurring liability for individual statutory damages, class statutory damages, mandatory attorney's fee awards, and even possible actual damages merely for arguing unresolved legal positions.

The same exposure would exist for taking positions supported by good-faith arguments for the extension, modification, or reversal of existing law. Petitioner would supplant the right to access to the courts inherent in Fed. R. Civ. P. 11 with a strict liability standard which leaves no room for being the loser in a good-faith dispute over a legal issue. There is no indication in the Act or its history that Congress intended to create a new class of litigants, held to a higher standard than Rule 11, yet simultaneously deprived of long-recognized common law

defenses to liability. This Court should not create such a class by denying recognition of the *bona fide* legal error defense.

CONCLUSION

CLLA and DBA urge that the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 08-1200

In the Supreme Court of the United States

KAREN L. JERMAN, PETITIONER

v.

CARLISLE, MCNELLIE, RINI, KRAMER & ULRICH, L.P.A. AND ADRIENNE S. FOSTER, RESPONDENTS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF *AMICUS CURIAE* DRI—THE VOICE OF THE DEFENSE BAR IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Is a debt collector's error in interpreting the law categorically ineligible for the bona fide error defense under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692k(c)?

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

The narrow issue in this case has broad and potentially troubling consequences for lawyers and clients in debt collection actions, including those represented by *Amicus* DRI—the Voice of the Defense Bar ("DRI"). Under the Fair Debt Collection Practices Act ("FDCPA" or the "Act"), a person engaged in debt collection may be held personally liable if he takes or threatens to take any action that cannot legally be taken under the Act. Violation of the Act is a strict liability offense. The Act provides a defense to liability, however, if the debt collector can prove that the violation of the Act was unintentional and, despite reasonable efforts to prevent it, "resulted from a bona fide error." 15 U.S.C. § 1692k(c). This case will determine how these provisions apply to errors of law, and thus it will have a direct impact on the risks faced by lawyers and on the attorney-client relationship itself.

Under Petitioner's view, lawyers and their legal judgments *are* subject to liability under the Act, but they *are not* eligible for the Act's bona fide error defense. Thus, according to Petitioner, a lawyer may be held personally liable whenever he takes a position concerning the debtor's rights that is ultimately rejected by a court, even if the lawyer was merely making a good-faith argument for the application or

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amicus*, its members, and its counsel made any financial contribution to the brief's preparation or submission. The parties have consented to the submission of this brief; letters of consent from both parties are on file with the Clerk.

extension of the law. As discussed in Respondents' brief, this position finds no support in either the plain language of the Act or its legislative history.

From an ethical perspective, moreover, Petitioner's position raises a host of problems for both lawyers and clients, including the membership of DRI. DRI is an international organization of attorneys defending the interests of businesses and individuals in civil litigation. DRI frequently participates as an *amicus curiae* in cases of interest to its membership. Many of DRI's member attorneys represent banks and other clients in collections matters. The Court's decision in this case will determine whether these attorneys must risk personal liability in order to take good-faith legal positions on their clients' behalf.

DRI submits this brief to alert the Court to the ethical implications of this issue, from DRI's unique perspective as the voice of defense lawyers and the clients they represent. As discussed below, Petitioner's view of the statute would create intractable problems for lawyers in debt collection actions, placing their personal interests in direct conflict with the interests of their clients and with the lawyers' own ethical obligations. And the Act's "safe harbor" provision does not obviate that problem. While a debt collector may insulate himself from liability for a legal judgment by obtaining an opinion in advance from the Federal Trade Commission ("FTC"), seeking such an opinion is not a realistic option for lawyers in litigation, nor would it obviate the conflict Petitioner's rule would create between lawyer and client. For these reasons, and those set forth in Respondents' brief, DRI urges this Court to reject Petitioner's view and affirm the decision below.

STATEMENT

In 2006, Respondents Adrienne Foster and law firm Carlisle, McNellie, Rini, Kramer & Ulrich served a complaint on behalf of their client, Countrywide Home Loans, seeking foreclosure on property owned by Petitioner Karen Jerman. Pet. App. 2a, 19a-20a. Attached to the complaint was a form notice that provided, among other things, that the alleged debt would be assumed valid unless Petitioner disputed the debt "in writing." Petitioner responded with a lawsuit of her own, complaining that Respondents did not provide her with proper notice under the FDCPA. According to Petitioner, the FDCPA did *not* require that she dispute the debt "in writing." On that basis, she argued that the notice and complaint she had received misrepresented her rights and obligations under the FDCPA.

Respondents moved to dismiss the lawsuit, arguing that inclusion of the words "in writing" did not violate the FDCPA. The district court denied the motion, accepting Petitioner's interpretation of the FDCPA's requirements—despite a split of authority on the issue—and holding that Respondents' notice had indeed violated the FDCPA. Pet. App. 36a.

After discovery, Respondents moved for summary judgment, arguing that they were shielded from liability under the FDCPA's "bona fide error" defense. According to Respondents, any "mistake" as to the "in writing" requirement was unintentional and resulted from a good-faith error regarding the meaning of the statute. See 15 U.S.C. § 1692k(c). The district court accepted this argument and granted the motion. Pet. App. 19a-41a.

Petitioner appealed, and the Sixth Circuit affirmed, agreeing with the district court that the bona fide error defense applied in this case. Pet. App. 1a-18a. This Court granted certiorari to resolve whether the bona fide error defense incorporates an exception that bars its application to errors of law.

SUMMARY OF ARGUMENT

If Petitioner's view of the statute were to prevail, attorneys litigating collections actions would face an irreconcilable ethical dilemma. Without immunity under the bona fide error defense, attorneys who make legitimate (but ultimately unsuccessful) legal arguments on behalf of their clients would do so at their peril, risking personal liability under the Act. This risk would inevitably interfere with the attorneys' ethical duty of zealous advocacy, pit lawyers' interests against their clients', and ultimately impair the development of the law. There is no reason to believe that Congress intended such a perverse result: the language of the statute does not support Petitioner's reading, and this Court's decision in *Heintz* v. *Jenkins*, 514 U.S. 291 (1995) strongly suggests that her reading is wrong.

Contrary to Petitioner's suggestion, the Act's safe harbor provision, 15 U.S.C. § 1692k(e), does not obviate these problems. The safe harbor provision excludes from liability "any act done or omitted in good faith in conformity with any advisory opinion of the [Federal Trade] Commission ["FTC"]." *Id.* While this clause does provide immunity under a narrow set of circumstances, in the overwhelming majority of cases—and particularly in the case of debt collections litigation—relying on the safe harbor provision would be both ineffective and impractical. Requiring a law-

yer to obtain an FTC advisory opinion whenever the law is not definitively settled (i) underestimates the number of issues on which the law in this area is unsettled or dynamic; (ii) ignores the fact that the FTC's ability to issue opinions is limited by regulation and by its own scarce resources; and (iii) again pits lawyers' interests against those of their clients, giving lawyers an incentive to delay litigation pending word from the FTC, despite their clients' interest in the speedy and efficient resolution of collections matters.

By the same token, the existence of the safe harbor provision does not undermine Respondents' reading of the bona fide error defense. Petitioner suggests that including legal errors among those protected by the bona fide error defense would render the safe harbor provision superfluous. This is incorrect. If the bona fide error provision is applied in a manner consistent with its plain language—as Respondents advocate—the safe harbor provision would still provide a meaningful *additional* avenue for obtaining immunity. Indeed, where a bank or other entity intends to adopt a new, widely applicable collections practice that has not yet been tested in the courts, waiting for application of the bona fide error defense in a suit for FDCPA liability may well present too great a risk. By obtaining FTC approval, however, the entity can resolve the issue of liability in advance, *before* deploying the new practice. Thus, the safe harbor provision remains meaningful under Respondents' reading of the Act.

ARGUMENT

I. Petitioner's view of the statute poses an irreconcilable ethical dilemma for attorneys.

The FDCPA imposes liability on any person engaged in debt collection who takes or threatens to take any action that is illegal under the Act's provisions. See 15 U.S.C. § 1692e; *id.* § 1692e(5) (forbidding a debt collector from making a "threat to take any action that cannot be legally taken" under the Act); see also *Wahl* v. *Midland Credit Mgmt., Inc.*, 556 F.3d 643, 646 (7th Cir. 2009) (recognizing that the FDCPA imposes strict liability and a collector "need not be deliberate, reckless, or even negligent" to violate the Act). Although Congress initially exempted lawyers from the Act's coverage, it removed the exemption in 1986. See *Heintz* v. *Jenkins*, 514 U.S. 291, 294-95 (1995) (citing Pub. L. 95-109, § 803 (6)(F), 91 Stat. 874, 875 and Pub. L. 99-361, 100 Stat. 768).[2] In light of that action by Congress, this Court has held that there is no longer any "implied exemption for those debt-collecting activities of lawyers that consist of litigating." 514 U.S. at 295.

Still, while it is firmly established that lawyers are no different than anyone else in terms of the Act's liability provisions, Petitioner proposes to deny lawyers, *in particular*, the protections of the Act's bona fide error defense. Specifically, Petitioner urges this Court to hold that the bona fide error defense does not protect a lawyer who takes a good-faith position concerning a debtor's rights that is ultimately re-

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[2] As this Court observed in *Heintz*, "when Congress later repealed the attorney exemption, it did not revisit the wording of [the Act's] substantive provisions." *Heintz* v. *Jenkins*, 514 U.S. 291, 295 (1995).

jected by a court. This interpretation is not supported by the Act's plain language. As Respondents' brief discusses in more detail, nothing in the text of the statute suggests an intent to limit the bona fide error defense to clerical errors and other mistakes not involving the exercise of legal judgment.

From an ethical perspective, moreover, Petitioner's reading of the Act would put lawyers between a rock and a hard place. The canons of ethics require attorneys to engage in zealous advocacy. See, *e.g.*, Model Rules of Prof'l Conduct R. 1.3 cmt. 1 (2006) ("A lawyer must . . . act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."); New York Lawyer's Code of Prof'l Responsibility EC 7-1 (2007) ("The duty of a lawyer, both to the client and to the legal system, is to represent the client zealously within the bounds of the law."); Texas Disciplinary R. Prof'l Conduct preamble para. 3 (West 2005) ("In all professional functions, a lawyer should zealously pursue clients' interests within the bounds of the law."). To fulfill this duty, lawyers are permitted—and in some circumstances are ethically *required*—to urge legal constructions favorable to their clients even where the law is unclear. See New York Lawyer's Code of Prof'l Responsibility EC 7-4. Such arguments are permitted so long as the position is supported by the law or by a good-faith argument for an extension, modification, or reversal of the law. See *id.*, EC 7-4; see also *id.* DR 7-101 (stating that an attorney should not intentionally fail to seek the lawful objectives of his clients through reasonably available means permitted by law and consistent with the attorney's ethical obligations). Under Petitioner's view of the FDCPA, however, if the court ultimately rejects the

lawyer's good-faith position, the debtor may be able to hold the lawyer personally liable by claiming that the lawyer took action that the Act (as ultimately interpreted by the court) does not permit.

This is the point at which the bona fide error defense becomes so critical. Under its plain language, this defense *should* provide lawyers with the same protection as any other person involved in debt collection—protection from liability if the erroneous legal judgment was made in good faith and despite reasonable procedures to prevent such errors from taking place. Without that defense, a lawyer could be held liable for taking a position that the rules of ethics permit—and, in some circumstances, *require*—him to take. See 15 U.S.C. § 1692e; *id.* § 1692e(5); see also *Green* v. *Hocking*, 9 F.3d 18, 21 (6th Cir. 1993) (per curiam) (recognizing that under the broad language of the FDCPA, if an attorney brings a lawsuit seeking the collection of a debt, "and the consumer prevails to any extent, it would appear that the law has been broken, as the creditor threatened to take action that apparently, as a result of the judgment, 'cannot legally be taken'").

Denying lawyers and legal judgments the protection of this important defense would thus create a host of negative consequences. Lawyers would find themselves limited by their own personal interests in making good-faith legal arguments on behalf of their clients—and indeed may find it impossible to meet their ethical obligation of zealous advocacy while also avoiding liability under the Act. And the development of the law would also be impaired. If an attorney faces personal liability for litigating and losing an unsettled issue of law, he may avoid the issue altogether, thus depriving the courts of the opportu-

nity to resolve the issue for future cases. There is no reason to believe that Congress intended such an absurd result.

This Court has already recognized the critical role the bona fide error defense plays for lawyers, and indeed, it relied on the availability of the defense in applying the Act's liability provisions to litigation in the first place. In *Heintz* v. *Jenkins*, the lawyers opposing application of the Act's liability provisions expressed concern that lawyers who brought and lost collections cases in court would be liable for "threat[ening] to take action that cannot legally be taken." *Id.* at 295. This Court was not concerned, in light of the bona fide error defense. Consistent with Respondents' position in this case, the *Heintz* court reasoned:

> [T]he Act says explicitly that a "debt collector" may not be held liable if he "shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." § 1692k(c). Thus, even if we were to assume that [appellant's] suggested reading of § 1692e(5) is correct, we would not find the result so absurd as to warrant implying an exemption for litigating lawyers.

Id. at 295-96.[3] *Heintz* thus strongly suggests that the bona fide error defense should provide the same protection to lawyers as it provides to anyone else. See *Johnson* v. *Riddle*, 305 F.3d 1107, 1123 (10th Cir. 2002) (stating that *Heintz* suggests that lawyers' errors of law are covered by the bona fide error defense); *Taylor* v. *Luper, Sheriff & Niedenthal Co., L.P.A.*, 74 F. Supp. 2d 761, 764-65 (S.D. Ohio 1999) (concluding, based on *Heintz*, that "the Supreme Court of the United States believes that the bona fide error defense is available to a lawyer who commits an unintentional violation of the FDCPA by asserting in good faith a claim that is later rejected by a court").

As Respondents' brief explains, neither the language nor the history of the Act supports the conclusion that Congress intended to put lawyers in an ethical bind. Nor is there any reason to believe that Congress intended to provide a disincentive for lawyers to make good-faith arguments on unsettled issues of law. Applying the plain language of the Act—and declining Petitioner's invitation to create an unwritten exception to the bona fide error defense—would avoid these absurd consequences.

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[3] The Court also suggested that a debtor would have to do more to impose liability on an attorney than merely pointing out that a collections action "turn[ed] out ultimately to be unsuccessful." *Id.* at 295-96. As the instant case demonstrates, however, lawyers certainly do face claims of liability when they take a specific legal position on an unsettled issue and ultimately do not prevail.

II. The irreconcilable ethical dilemma posed by Petitioner's interpretation of the Act is not resolved by the safe harbor provision.

Anticipating the ethical dilemma posed by her position, Petitioner points to the Act's safe harbor provision, 15 U.S.C. § 1692k(e), suggesting that if an attorney is not absolutely certain of the legal correctness of a collections practice or legal theory, the attorney can obtain immunity by requesting an advisory opinion from the FTC in advance. See Pet. Brief 34. The safe harbor provision shields from liability

> any act done or omitted in good faith in conformity with an advisory opinion of the [Federal Trade] Commission, notwithstanding that after such act or omission has occurred, such opinion is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

15 U.S.C. § 1692k(e).

While this provision provides debt collectors with a method of obtaining immunity in a narrow range of circumstances, it does not resolve the ethical dilemma posed by Petitioner's interpretation of the statute. Requiring attorneys to obtain an FTC advisory opinion before litigating any unsettled issue under the Act would be impractical, if not impossible, and it would exacerbate—rather than resolve—the conflict Petitioner's reading would pose for lawyers and clients.

A. The sheer number of unsettled issues under the FDCPA make the safe harbor provision an utterly impractical solution.

The suggestion by Petitioner and her *amici* that an attorney should seek an FTC opinion every time he faces legal uncertainty in a collections action greatly underestimates the number of issues under the Act on which the law is unsettled or, at the very least, susceptible to good-faith arguments for modification or reversal. The *amici* States, for example, suggest that debt collectors only risk liability when they "go perilously close to an area of proscribed conduct." States' *Amicus* Brief 15. But in reality, legal certainty is the exception, not the rule. The clarity of law in this area ranges from well-settled doctrine through areas of conflicting authority to areas entirely without precedent. Moreover, the bounds of the law in a given case are often difficult to ascertain; the application of the Act or a judicial opinion interpreting it may be uncertain with respect to any particular factual scenario.

The instant case provides a perfect example. As noted above, Respondents were held liable for stating in their notice that the debtor's objection would have to be "in writing." But in the Third Circuit, a debt collector is *required* to include such language. See *Graziano* v. *Harrison*, 950 F.2d 107, 112 (3d Cir. 1991) (holding that the notice provisions of the FDCPA "must be read to require that a dispute, to be effective, must be in writing"); see also, *e.g.*, *Register* v. *Reiner, Reiner & Bendett, PC*, 488 F. Supp. 2d 143, 147 (D. Conn. 2007) (noting, fifteen years after *Graziano*'s publication, the continuing split of authority regarding whether a debtor must dispute the validity

of a debt "in writing"). Thus on the very issue that led to Respondents' liability, there remains a split of authority—and, therefore, Respondents had at *least* a good-faith basis for taking the position they took.

The split of authority on the "in writing" requirement is but one example of legal uncertainty under the FDCPA. Courts are currently divided on a number of issues, including the fairly fundamental questions of whether a debt collector's communications to a debtor's lawyer can be the subject of an FDCPA suit, see *Evory* v. *RJM Acquisitions Funding L.L.C.*, 505 F.3d 769, 772 (7th Cir. 2007), and whether a party enforcing a security interest is a debt collector, see *Maynard* v. *Cannon*, No. 2:05-CV-335DAK, __ F. Supp. 2d __, 2008 WL 2465466, *3 (D. Utah June 16, 2008); see also, *e.g.*, *Gonzalez* v. *Kay*, 577 F.3d 600, 604-07 (5th Cir. 2009) (acknowledging, in light of varying precedents, that case was "close," but holding that a letter which printed a disclaimer on reverse side of page could be deceptive); *id.* at 607 (Jolly, J., dissenting) (concluding that letter conformed with standards of legality recognized in *Greco* v. *Trauner, Cohen & Thomas, LLP*, 412 F.3d 360 (2d Cir. 2005) and stating his view that the majority's decision created a circuit split).

It simply is not the case that legal uncertainty is rare in collections claims. If lawyers are expected to pursue an FTC advisory opinion every time the law reveals a degree of ambiguity, consumer collections claims would grind to a halt. For this reason alone, the safe harbor provision could not possibly avoid the ethical dilemma posed by Petitioner's position in this case.

B. FTC opinions can only address a narrow range of issues and have limited legal force.

The regulatory limitations on the FTC's opinion process also render the safe harbor provision inadequate to protect lawyers. The regulations governing FTC advisory opinions provide as follows:

> (a) Any person, partnership, or corporation may request advice from the Commission with respect to a course of action which the requesting party proposes to pursue. The Commission will consider such requests for advice and inform the requesting party of the Commission's views, where practicable, under the following circumstances.
>
> (1) The matter involves a substantial or novel question of fact or law and there is no clear Commission or court precedent; or
>
> (2) The subject matter of the request and consequent publication of Commission advice is of significant public interest.

16 C.F.R. § 1.1. These regulations, along with inherent limitations on the FTC's advisory authority, significantly confine the advice the FTC can provide.

First, for an opinion to issue, the conduct inquired about must be prospective in nature. See 16 C.F.R. § 1.1(a) (allowing debt collectors to "request advice from the Commission with respect to any action which the requesting party *proposes* to pursue") (emphasis added). The regulations do not allow debt collectors or their attorneys to request advice regarding a course of action that has already been taken,

severely limiting a lawyer's ability to clarify the law by this method. Thus, for many legal issues, the safe harbor provision would provide attorneys no help at all.

Second, FTC advisory opinions are limited in terms of the substantive legal questions they can address. As Petitioner admits, the FTC has no authority to render opinions interpreting state law. Pet. Brief 47-48. Thus, the safe harbor clause provides no refuge to lawyers caught between conflicting FDCPA and state law requirements. Moreover, the applicable regulations limit FTC opinions to questions involving "substantial or novel question[s] of fact or law" on which "there is no clear Commission or court precedent." 16 C.F.R. § 1.1(a)(1). The FTC determines whether these criteria are met, and their decisions appear to be final. See, *e.g.*, Letter from Christopher W. Walker, Division of Credit Practices, Federal Trade Commission, to Bernard Fagin, President, National Credit Management (April 22, 1988) (available at http://www.ftc.gov/os/statutes/fdcpa/letters/fagin.htm) (acknowledging Fagin's request for advice made pursuant to the safe harbor provision but stating that the Commission "doubt[ed] that [his] request would meet the requirements necessary for a formal advisory opinion"). The FTC provides no guidance as to how it will determine the novelty or substance of issues, nor as to how it evaluates the clarity of Commission or court precedent.

Finally, even if an attorney succeeds in obtaining an advisory opinion from the FTC about a prospective course of action, such an opinion would not resolve the lawyer's ethical issue, because the obligation of zealous advocacy may still require the lawyer to challenge the FTC's opinion in litigation. The courts, not

the FTC, are the final arbiters of the meaning of the Act. See 15 U.S.C. § 1692k(e) (FTC opinions can be "amended, rescinded, or determined by judicial or other authority to be invalid"); see also *Rosenau* v. *Unifund Corp.*, 539 F.3d 218, 225 (3d Cir. 2008) ("[T]he FTC's advisory opinions are not entitled to deference in FDCPA cases except perhaps to the extent that their logic is persuasive.") (internal quotation marks and citation omitted); *Lewis* v. *ACB Bus. Servs, Inc.*, 135 F.3d 389, 399 (6th Cir. 1983) (same, collecting cases). Thus, an FTC opinion declaring a legal position to be invalid would not necessarily relieve the attorney of his ethical obligation to advance that position in court.

C. The FTC is not equipped to undertake the volume of cases Petitioner expects it to address, much less to do so within the time required for lawyers in individual collections matters – and thus the safe harbor provision would exacerbate rather than solve the ethical dilemma posed by Petitioner's reading.

If Petitioner's view of the statute were to prevail, there would likely be a dramatic increase in the requests for advisory opinions from the FTC. But if past experience is any guide, the FTC will be unable to keep up with this new demand, and it certainly could not do so within the timeframe necessary to make such opinions useful in individual collections matters.

To DRI's knowledge, in the thirty-two years since the FDCPA was enacted, the Commission has issued

only *four* advisory opinions.[4] See FTC.org, Fair Debt Collection Practices Act Links, http://www.ftc.gov /os/statutes/fdcpajump.shtm (last visited November 25, 2009). This paucity of guidance belies Petitioner's contention that the safe harbor provision provides a viable avenue for clarification of legal issues.

Moreover, even when the FTC takes an issue under consideration, it often does not issue its advisory opinion until months or even a year has elapsed. The FTC's most recent advisory opinion (which was only two pages long) was issued more than sixteen months after it was requested. See Letter from Donald S. Clark, Secretary, Federal Trade Commission, to Rozanne M. Anderson and Andrew M. Beato (June 23, 2009), available at http://www.ftc.gov/os/statutes /andersonbeatoletter.pdf (responding to attorneys' February 11, 2008 request). While this time frame may be adequate to clarify the legality of new collections practices that a collector may be hoping to implement on a broad scale, it is utterly inadequate for purposes of legal issues in individual collections matters.

If a lawyer must obtain an FTC advisory opinion on an unsettled issue in order to protect himself from personal liability, the conflict between the lawyer and client would be exacerbated, rather than eliminated. The process of obtaining an advisory opinion inevitably takes time and would delay resolution of

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[4] Informal staff commentary and opinions on the FDCPA do not provide immunity under the safe harbor provision, see 15 U.S.C. § 1692k(e); *Hulshizer* v. *Global Credit Services, Inc*, 728 F.2d 1037, 1037-38 (8th Cir. 1984), and, in any case, have been discontinued by the FTC except in "unusual circumstances." See Fair Debt Collection Practices Links, http://www.ftc.gov /os/statutes/fdcpajump.shtm (last visited November 25, 2009).

collections matters for reasons related only to the lawyer's personal interest in avoiding liability. But under the canons of ethics, a lawyer should not accept employment if there is a reasonable possibility that the lawyer's own interests will adversely affect the services rendered to the client. See Model Rules of Prof'l Conduct R. 3.2 ("A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client."); New York Lawyer's Code of Prof'l Responsibility EC 5-2 ("A lawyer should not accept proffered employment if the lawyer's personal interests or desires will, or there is reasonable probability that they will, affect adversely the advice to be given or services to be rendered the prospective client."); Hawaii Rules of Prof'l Conduct R. 1.7 cmt. 6 ("The lawyer's own interests should not be permitted to have adverse effect on representation of a client."). And it is not only the client's preference for speedy resolution that would be jeopardized; waiting for an FTC opinion could imperil the collections claim under the statute of limitations, and could also result in the devaluation of collateral or the inability to locate missing debtors. Again, from the perspective of lawyers in individual collections matters, the safe harbor provision is no substitute for the bona fide error defense.

III. A proper construction of the safe harbor provision does not undermine Respondents' argument that mistakes as to the meaning of the law are "bona fide errors" within the meaning of the FDCPA.

The safe harbor provision does not provide a way out of the ethical dilemma created for attorney debt collectors by Petitioner's desired interpretation of the statute. But neither does the FDCPA's inclusion of

the safe harbor provision undermine Respondents' reading of the bona fide error defense. Petitioner argues that Respondents' reading of the bona fide error defense renders the safe harbor provision superfluous because "every application of the safe harbor defense is covered by the bona fide error provision." Pet. Brief 29. That is not the case. Even under Respondents' reading of the bona fide error defense, the safe harbor provision retains independent value as an *additional* protection in narrow circumstances.

As the legislative history makes clear, Congress intended that there be two independent sources of immunity under the Act: the bona fide error defense, which provides immunity in retrospect, and the safe harbor provision, which immunizes collection practices in advance. See S. Rep. No. 95-382, at 5 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1695, 1700 ("A debt collector has no liability, however, if he violates the act in any manner, *including with regard to the act's coverage*, when such violation is unintentional and occurred despite procedures designed to avoid such violations. A debt collector *also* has no liability if he relied in good faith on an advisory opinion issued by the Federal Trade Commission.") (emphasis added); see also Federal Deposit Insurance Corporation, *FDIC Compliance Handbook* VII-4.3 (2006) ("A debt collector is not liable for a violation if a preponderance of the evidence shows it was not intentional and was the result of a bona fide error that arose despite procedures reasonably designed to avoid any such error. The collector is *also* not liable if he or she, in good faith, relied on an advisory opinion of the Federal Trade Commission . . . .") (emphasis added). The fact that one applies in retrospect and the other

in advance is by itself enough to defeat any suggestion that the two are duplicative.

Indeed, for all its limitations, the safe harbor provision may still provide an important source of comfort for debt collectors who are considering whether to adopt a new collections practice more broadly than in an individual case. In that instance, the potential liability arising from an error might be crippling based on the breadth of its implementation (15 U.S.C. § 1692k(b)), and waiting until litigation to determine whether the bona fide error defense will apply would create too much risk. In an individual collections matter, in contrast, the safe harbor provision—while technically available—is both too restrictive and too cumbersome to provide any meaningful protection.

CONCLUSION

This case has dramatic implications for attorneys litigating collections cases. If Petitioner's view prevails, these attorneys risk personal liability for acting consistent with their ethical obligation of zealous advocacy. Although Petitioner attempts to deflect attention from lawyers' predicament by pointing to the safe harbor provision, requiring lawyers to obtain an FTC advisory opinion whenever the law is less than fixed is an untenable solution. It underestimates the number of legal issues implicated by such a scheme, overestimates the conclusiveness of the FTC's opinions and practical capacity to handle the demand for such advice, and pits lawyers' interest in immunity against clients' interest in the efficient collection of debts. Although the safe harbor provision plays a meaningful role in immunizing debt collectors' conduct prospectively, it should not be read to

limit the immunity provided by the bona fide error defense. For all these reasons, and the reasons set forth in Respondents' brief, DRI urges this Court to affirm the decision below and hold that the bona fide error defense applies with equal force to errors of law.

Respectfully submitted.

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NOVEMBER 2009

AMICUS CURIAE BRIEF

No. 08-1200

In The
Supreme Court of the United States

KAREN L. JERMAN,

Petitioner,

v.

CARLISLE, McNELLIE, RINI, KRAMER & ULRICH, LPA AND ADRIENNE S. FOSTER,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR THE MISSISSIPPI CREDITORS' ATTORNEYS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

The Fair Debt Collection Practices Act (FDCPA) reads as follows in 15 U.S.C. Section 1692k(c)

> A debt collector may not be held liable in any action brought under this title if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

Is an error of law excluded from the word "error"?

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INTEREST OF *AMICUS CURIAE*[1]

The Mississippi Creditors' Attorneys Association is composed of attorneys who practice law in the area of debt collection and are dedicated to the ethical and responsible collection of debts. The Association is involved in the education of businesses, banks, law schools, creditors, consumers and the public in general in the proper methods for collection of debts. Members deal daily with the Fair Debt Collection Practices Act and are frequent speakers at seminars and lectures concerning the FDCPA.

SUMMARY OF ARGUMENT

Carlisle acted as an attorney in a foreclosure action against Jerman.[2] Pursuant to the Fair Debt Collection Practices Act (FDCPA), Carlisle sent Jerman a document referred to as a validation notice. Part of the purpose of the FDCPA is to determine that the consumer does indeed owe the debt that is being

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission. Letters reflecting the blanket consent of the parties have been filed with the Clerk.

[2] In this Brief the Respondent/Defendant/debt collector/attorney is sometimes referred to as "Carlisle" and the Petitioner/Plaintiff/consumer as "Jerman".

attempted to collect. The purpose of the validation notice is so that the debtor can notify the debt collector if the debt has been paid. Jerman received the validation notice and did what the FDCPA was intended to accomplish – Jerman notified Carlisle that the debt had been paid. Carlisle received this notification, investigated the matter to make sure that this notification was correct, determined that the debt had been paid, and then ceased further collection efforts. The FDCPA worked in this case.

Nevertheless, Jerman sued Carlisle. Jerman contended that there was a technical wording error in the validation notice that was sent by Carlisle to Jerman. In at least four circumstances, the FDCPA requires when a consumer gives notice to a debt collector, that notice must be in writing. Another circumstance does not require that a particular notice be in writing. Pursuant to Section 1692g, if the consumer does not dispute the debt within 30 days after receiving the validation notice, then the debt collector can assume that the debt is valid.[3] Even though other notices by the consumer must be in writing, the words of the FDCPA do not state this particular notice from the consumer to be in writing.[4]

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[3] Pursuant to Section 1692g(c), the failure of consumer to dispute the validity of the debt under this section may not be construed by any court as an admission of liability by consumer.

[4] It should be noted that Jerman did give notice in writing to Carlisle. Thus, even though the FDCPA does not require that this notice be in writing, Jerman did so in writing. In fact,

(Continued on following page)

The validation notice that Carlisle sent stated that this particular notice by Jerman was to be in writing. This is the "error" that is the basis of this lawsuit.[5]

In preparing his validation notice, Carlisle researched the law. He found several cases that held that it was proper to put the words "in writing" in the place that he did in his validation notice. Even though there was conflicting case law, the District Court ruled that it was an error of law for Carlisle to have inserted the words "in writing" where Carlisle did. However, the Court found that Carlisle was not liable since (a) he had a bona fide reason for having inserted the words "in writing", (b) he had done legal research on this issue and thus the violation was not intentional, and (c) he had procedures that were adapted to avoid such error.

The FDCPA provides a defense for just a situation as in this case. Carlisle did not act maliciously or egregiously, and there is no contention that he did. He acted responsibly and did what an attorney should do. He researched the law and arrived at a legal conclusion. Even though the District Court disagreed with Carlisle's legal conclusion, the Court acknowledged that there were legal authorities and

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Jerman contacted an attorney who gave this written notice to Carlisle.

[5] It takes a very close reading of the FDCPA to notice that the words "in writing" are omitted from the first sentence in the statute but included in the next two sentences. A reader of this case upon first impression probably wonders where the error is.

cases that supported Carlisle's conclusion. Carlisle fits all elements of the bona fide error provision of the FDCPA – (1) he had a bona fide reason for inserting the words "in writing"; (2) he did legal research and therefore did not commit an intentional violation; and, (3) he had procedures to avoid legal errors. Carlisle should be protected by the plain language of the FDCPA.

ARGUMENT

The statute is clear. Its words do not exclude an error of law as a defense.

15 U.S.C. Section 1692k(c) is clear. It provides that a "bona fide error" is a defense to an FDCPA action. It does not exclude an error of law as a defense.

All the Circuits that have ruled that an error of law is a defense have done so on this simple point. *Johnson v. Riddle,* 305 F.3d 1107, 1123 (10th Cir. 2002) states that

> *the plain language of the FDCPA* suggests no intent to limit the bona fide error defense to clerical errors. To the contrary, Section 1692k(c) refers by its terms to any 'error' that is 'bona fide.' *We find no indication in the legislative history that Congress intended this broad language to mean anything other than what is says.* [Emphasis added.]

Neilsen v. Dickerson, 307 F.3d 623, 641 (7th Cir. 2002) holds that "*The FDCPA's provision does not expressly remove legal mistakes* from the realm of errors that can be considered bona fide" and further succinctly ruled that "a legal mistake can qualify as a bona fide error under the FDCPA." *Jerman v. Carlisle,* 538 F.3d 469, 476 (6th Cir. 2008) holds that "the FDCPA's bona fide error defense applies to mistakes of law." *Jerman*, at 473, cited several Ohio District Courts decided in 1999, 2005, 2007 and 2008 which also ruled the same, and quoted with approval from these cases which held that the bona fide error defense applies to debt collection attorneys who unintentionally violate the FDCPA by asserting in good faith a legal claim that was later rejected by a court. *Jerman*, at 473, explained that recent and more persuasive cases have held that the defense is available for mistakes of law, and concluded by stating "*[t]here is nothing in the language of [the bona fide error defense] which limits its application to clerical mistakes* or ministerial errors." [Emphasis added.]

The Supreme Court has noted that courts shall enforce statutes according to their plain wording. *Lamie v. U.S. Trustee*, 540 U.S. 526 (2004). "To supply omissions transcends the judicial function." *Iselin v. United States*, 270 U.S. 245, 251 (1926). *Heintz v. Jenkins,* 514 U.S. 291, 294 (1995) requires the use of "ordinary English" in construing statutes. *Heintz* applied the FDCPA to lawyers. Since FDCPA has a bona fide error defense, it would be unfair, inconsistent, and illogical to apply FDCPA to a lawyer, have a

bona fide error provision, and not allow a lawyer error.

The Petitioner and others advocating their position evidently want to change the statute. They contend that what the statute really means is that a "bona fide error is a defense, *except for an error of law*." However, the statute clearly does not state this. The statute simply says "error". It does not limit the type of error. If Congress had intended to say "except for an error of law", then Congress clearly knows how to say that. Congress did not say that.

Petitioner and others go through strained interpretations to get to their conclusion that an error of law is not a defense to an FDCPA action. Respondent does not have to resort to a strained interpretation. Respondent simply reads the statute. This case can be resolved by simply following the statute. There is no need to try to rationalize the statute. There is no need to guess or argue about what Congress intended. All we have to do is read the statute. It is clear. It does not say what Petitioner and others say that it says.

Safeco.

Safeco Ins. Co. of America v. Burr, 551 U.S. 47 (2007) supports the proposition that an error of law is a defense. The Supreme Court held that there was not a "willful" violation of the Fair Credit Reporting Act ("FCRA") where an act was taken by Safeco Insurance Company based on a point of law, but

Safeco was wrong as to that point. The Supreme Court held that Safeco misread the FCRA but such misreading had a legitimate basis and "therefore" was not "willful".

FCRA uses the word "willful".[6] FDCPA uses the word "intentional". Petitioner and accompanying *amici* parties contend that there is a material difference between "willful" and "intentional". Webster's Dictionary defines "intentional" as "a determination to act in a certain way". This sounds like "willful". It defines "willful" as "done deliberately". This sounds like "intentional". *Webster's Dictionary lists as the only synonym of "willful" the word "intentional". Safeco*, at 58, requires that a common law term in a statute should be given its common law meaning.

Thus, Safeco stands for the proposition that an error of law is a defense for a "willful" or "intentional" violation. The opposing *amici* Briefs allude to some criminal cases in trying to distinguish the word "willful" from the word "intentional". But *Safeco*, at 60, succinctly and briefly points out that "the criminal side . . . is beside the point in construing the civil side."

Analysis of cases – pro and con.

This case arrives at the Supreme Court via certiorari, because there is a split of authority among

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[6] 15 U.S.C. Section 1681n.

the Circuits. Three Circuits say that an error of law is a defense to an FDCPA lawsuit, and three Circuits say that an error of law is not a defense to an FDCPA lawsuit. Therefore, it is appropriate to analyze the cases in these Circuits to see why they held as they did.

Analysis of cases which hold that an error of law is not a defense.

The leading case for this proposition is *Baker v. G.C. Services Corp.*, 677 F.2d 775 (9th Cir. 1982).[7] It relied primarily on the TILA analogy.[8] It also relied on the theory that in an FDCPA case "That defendant . . . mistook the law does not make its *action* any less intentional", at 779 [Emphasis added.][9]

Pipiles v. Credit Bureau of Lockport, Inc., 886 F.2d 22 (2nd Cir. 1989) did not decide the bona fide error portion of FDCPA which is Section 1692k(c). It specifically stated that "There was no consideration,

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[7] Even though *Baker* is the leading case for this proposition, notice that Petitioner does not cite or discuss *Baker*, nor *Pipliles, Hulshizer, infra* or *Picht, infra*.

[8] This analogy has been rejected by several subsequent cases. See *Johnson, Neilsen,* and *Jerman, supra*.

[9] *Baker* misstates the law here. It is not the *act* that must be intentional. It is the *violation* that must be intentional. In the instant *Jerman* case, even though Carlisle may have intentionally inserted the words "in writing", he did legal research and had a legitimate basis for doing so. Thus, he did not intentionally *violate* the FDCPA. *Safeco*.

however, of the specific requirements of section 1692k(c) . . . " The Court commented that "We note that the Bureau [defendant debt collector] did not plead a section 1692k(c) defense in its answer, or argue it on appeal." The Court did state that "In any event, it is likely that the violation which we have found resulted from a mistaken view of the law, which section 1692k(c) does not excuse." It then simply referred to *Hulshizer* and *Baker*, which cases are discussed in this Brief.

Pipiles does underscore the basic principle urged by Respondent. *Pipiles*, at 26, stated that "the starting point for our interpretation of a statute is always its language" and that "absent a clear expressed legislative intention to the contrary, [the language] must ordinarily be regarded as conclusive." It then used this principle of law to conclude, at 27, that since the FDCPA uses the words "all communications", then it meant "all communications". It commented that to allow certain communications to omit a required disclosure, then the clear and unambiguous language "all communications" would effectively be changed to "some communications". It concluded by stating that "We are not at liberty to substitute a view different from that expressed by Congress *in the legislative enactment.*"[10]

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[10] The same principle is appropriate in the instant case. Since FDCPA states "error", then it means "error". It does not mean "error, except error of law". We are not at liberty to

(Continued on following page)

Hulshizer v. Global Credit Services, Inc., 728 F.2d 1037 (8th Cir. 1984) is a one page, four paragraph case which really did not involve an error of law. The debt collector in that case did not do any legal research and did not base its action on any case interpretation of the FDCPA. Rather the debt collector "chose to follow the informal advice of a Commission staff attorney and representatives of the American Collectors Association rather than the clear language of the statute", at 1038.[11] The debt collector based his position on the FTC Opinion portion of the statute and contended that the opinion of an FTC attorney was the same as an FTC Opinion. But again, the FDCPA is clear – it says FTC Opinion, not an opinion from an FTC attorney.[12] *Hulshizer* relied on *Baker,* which is discussed in this Brief.

Picht v. Hawks, 236 F.3d 446 (8th Cir. 2001) does not give any analysis of its holding that an error of

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substitute a view different from the express wording of the FDCPA.

[11] Opposing parties argue that Respondent (Carlisle) should (and perhaps must) have followed some publication by the American Collectors Association (ACA) in order to qualify for the bona fide error defense. Understandably, they cite no legal authority for such suggestion. It is furthermore ironic that they would argue that some ACA advice should have been followed, because in *Hulshizer* a debt collector was found liable in part for having followed ACA advice.

[12] Similarly, FDCPA says "error", not "error, except error of law". *Hulshizer* is based on the principle to "follow the statute".

law is not a defense. It simply refers to *Baker* and *Hulshizer,* both of which are discussed in the Brief.

Analysis of cases which hold that an error of law is a defense.

Johnson v. Riddle, 305 F.3d 107 (10th Cir. 2002) is one of the leading cases on this subject matter and holds that an error of law is a defense. It ruled as follows: (a) bona fide error language of FDCPA is clear and unambiguous, (b) is supported by legislative history, (c) responds to and rejects the TILA argument of *Baker* on the basis that the language of TILA is different from FDCPA, (d) cites and relies on the logic of *Heintz v. Jenkins,* 514 U.S. 295 (1985), (e) states that not allowing an error of law as a defense would lead to absurd results, e.g. would in some cases make liable a litigating lawyer who lost a claim against a debtor, at least an error of law may contribute to the reasons why some debt collection cases are lost, and could lead to a compromise of an attorney's ethical duty to advocate claims that would zealously represent his client for fear that such advocacy could expose the attorney to liability under FDCPA, (f) responds to and rejects the notion that the use of the word "procedures" in the bona fide error provision means that an error of law is not a defense and cites several cases that support this conclusion, and (g) notes that most all of the cases that do not allow errors of law as a defense rely on *Baker* and then respectfully disagrees with *Baker*.

Neilsen v. Dickerson, 307 F.3d 623 (7th Cir. 2002) ruled that an error of law is a defense. It made the following rulings: (a) considered but rejected the TILA argument at 640-41, (b) held that nothing in the bona fide error provision limits it to clerical errors and not legal errors at 641, and (c) noted that in order for the bona fide error defense not to apply the *violation* must be intentional, not the *act*, and stated that the debt collector "may avail itself of the bona fide error defense because it had no intent to violate the FDCPA, although its actions were deliberate", at 641.

Jerman v. Carlisle, 538 F.3d 469 (6th Cir. 2008) points out that the more recent and persuasive cases hold that an error of law is a defense. It cites and relies on *Johnson* and *Neilsen* and rejects the holdings of the three Circuit cases which hold that an error of law is not a defense – *Baker, Picht*, and *Pipiles*. It noted that *Picht* and *Pipiles* relied on *Baker*, and then specifically rejected the reasoning of *Baker. Baker* relied on the TILA argument put forth by Petitioner. *Jerman* rejected this TILA argument because TILA contained a bona fide error defense which specifically excepted "an error of legal judgment", but "[t]he FDCPA provision does no such thing", at 474. It concluded by stating that

> The plain language of the FDCPA suggests no intent to limit the bona fide error defense to clerical errors. To the contrary, Section 1692k(c) refers by its terms to any 'error' that is 'bona fide.'

It looked to legislative history and found "no indication . . . that Congress intended this broad language to mean anything other than what it says." *Jerman* noted that "the FDCPA's provision does not expressly remove legal mistakes from the realm of errors that can be considered bona fide", at 475.

Jerman noted and rejected the FTC Opinion argument in one sentence and stated, at 478, that

> if seeking an [FTC] advisory opinion is the only 'meaningful procedure' that can be adapted in order to avoid liability for bona fide legal errors under Section 1692k(c), then the FDCPA's separate safe-harbor provision for collectors who act upon the advice of the Commission would be superfluous.

Jerman also held that there are indeed "procedures" that can be used to avoid legal errors and specifically noted several such procedures, e.g. the considerable time, effort and legal research that Carlisle spent in evaluating the validity of the "in writing" requirement, Carlisle's compliance officer regularly attended FDCPA seminars, examined and distributed relevant case law, regularly held meetings, encouraged open discussion of FDCPA issues, and took good faith steps to comply with the law.

Jerman v. Carlisle, 502 F. Supp. 2d 686 (N.D. Ohio 2007) ruled that if a word in a statute is not limited, then it is to be given a "broad" definition, and an exception to a word is only to be given effect if

there is an exception specifically mentioned in the statute.[13]

This Court discussed the word "intentional" within the bona fide error provision of FDCPA and concluded that in order to deprive the debt collector of this defense that *the violation must be intentional, not the act.* "A debt collector must only show that the violation was intentional, not that the communication [act] itself was unintentional," at 693.

This Court noted the contrary ruling in *Baker* and declined to follow *Baker.*[14] *Jerman,* at 694, considered but rejected *Baker's* holding which was based on the TILA argument. Citing *Johnson, Jerman* at 694 held that "the TILA analogy is faulty". It further stated that the TILA bona fide error provision is expressly limited to errors of fact and specifically excepted errors of law and "The FDCPA provision does no such thing. This, along with the statutes' different purposes, distinguishes the two." Citing and relying on the logic of *Johnson, Jerman* at 694 concluded that

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[13] The Court did this in its discussion of the word "communication" in the FDCPA. This same principle of statutory interpretation points out that the word "error" in the FDCPA is to be given "broad" meaning, and exceptions (e.g., an error of law) are not to be engrafted into the FDCPA since there are no exceptions specifically stated therein.

[14] This Court observed, at 694, that "Of the cases that hold that the defense does not apply to mistakes of law, almost all dispense with the issue by citing earlier cases back to the Ninth Circuit's decision in *Baker v. G.C. Servs. Corp.*"

> Unlike TILA, the plain language of the FDCPA suggests no intent to limit the bona fide error defense to clerical errors. To the contrary, Section 1692k(c) refers by its terms to any 'error' that is 'bona fide.' We find no indication in the legislative history that Congress intended this broad language to mean anything other than what it says. This Court agrees with this reasoning and, accordingly, finds that the bona fide error defense applies to mistakes of law.

The same FTC Opinion argument that Petitioner is making in this appeal was made to the District Court, who had little trouble in disagreeing with it. In one short paragraph, the Court at 696 stated

> Finally, plaintiff [Jerman] claims that defendants [Carlisle] could have requested an advisory opinion from the Federal Trade Commission, thereby ensuring that they acted in good faith. However, defendants were not obligated to do so, and the issue herein is not whether defendants should have insulated themselves from liability but whether they acted in good faith.

Majority rule.

It appears that the majority rule now is that an error of law is a defense. Petitioner states that the majority rule is that error of law is not a defense. This is highly questionable. The Circuits are evenly split. The 2nd, 8th, and 9th hold that way. The 6th, 7th, and 10th hold that error of law is a defense.

The 2002 case of *Johnson* did state that the majority rule was that an error of law is not a defense, but that was in 2002. Even if that was correct in 2002, it is highly unlikely that such is true at the time of this appeal in 2009. It appears that more cases are now holding that error of law is a defense than to the contrary. One thing is clear – the more recent cases are deciding that an error of law is a defense. Indeed, the last three (3) Circuits to have considered this issue have ruled that an error of law is a defense.[15]

As a further illustration of the trend of court rulings, notice that of the 21 recent cases cited in footnotes 21 and 22 of Respondent's Brief, none of them held that an error of law defense was not available as a matter of law, i.e. none of them held that an error of law was not a defense. The seven cases in footnote 21 either did not involve an error of law as a defense or ruled on summary judgment that the debt collector did not prove that his procedures were adequate, not that the bona fide error defense was not available.

Petitioner cannot "read into" the statute.

Petitioner and others want to read into the statute something that is simply not there. They want to "read into" the statute their argument of

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[15] *Safeco*, decided in 2007, further illustrates the trend of courts in allowing an error of law defense.

"except errors of law", but those words clearly are not in the statute. However, Petitioner's entire case is based on the argument that the words "in writing" placed into the debt collector/attorney's initial communication are not in the statute. Petitioner and accompanying *amici* parties argue that the words "in writing" should not be "read into" the statute. In other words, they argue "Follow the statute." They argue that simply because the statute does not state "in writing", then the attorney's communication was incorrect and therefore formed a violation of the FDCPA. For Petitioner's case to prevail she must and does strongly argue and shout – "Read the statute! Read the statute! The statute does not contain the words 'in writing' at the place where Defendant's letter put them, but yet the Defendant attorney/debt collector's communication included those words." Petitioner wants to convince this Court that even though the FDCPA statute [Section 1692g(b)] should be interpreted and applied *as it is written*, that the FDCPA statute [Section 1692k(c)] should not be interpreted *as it is written*. Petitioner cannot have it both ways.

Petitioner seeks to abandon the legal principle that has gotten her thus far in this case.

Petitioner contends that the word "error" should be *limited* only to an error of fact, and does not include an error of law. Respondent contends that since "error" is not limited within the statute, then it

is not limited. Respondent contends that the legal principle here is that if a word is not limited – then it is not limited.

In order to test and analyze the above legal principle, it is interesting to note what has happened previously in this instant case. One of the issues early on in this case was an interpretation of the word "communication." Plaintiff (Jerman) contended that there was an FDCPA violation because Defendant (Carlisle) did not make certain disclosures that must be made by the debt collector when the debt collector makes a "communication." See Section 1692g(a). Plaintiff contended that these required disclosures were not made in a pleading that Defendant (Carlisle) filed. Jerman contended that the pleading that Carlisle filed was a "communication." Jerman contended this, because the word "communication" was *not limited* in the FDCPA. The District Court ultimately agreed with Jerman and held that the pleading filed by Carlisle was indeed a "communication" since it was not limited and fit the common, English language definition of the word "communication". The Court held that since the word "communication" was not limited in the statute – then it was not limited. Jerman contended that the word "communication" did not mean "communication, *except for a pleading.*" Jerman contended that one could not "read into" the statute words that were not there. The Court agreed with Jerman and held that there was no exception in the statute, and words could not be "read into" the statute. Thus, it is

remarkably inconsistent for Jerman to now argue that the word "error" is somehow limited only to errors of fact.

The same legal principle is also illustrated by the history of the FDCPA itself. When originally enacted, the FDCPA in 1977 specifically provided that the definition of "debt collector" meant "debt collector, except for an attorney." This attorney exception was specifically stated in the FDCPA. In 1986, Congress changed this portion of the FDCPA by merely eliminating the attorney exception. The language of "except for an attorney" was taken out. Thus, the phrase "debt collector" became unlimited. *Heintz, supra*, ruled that attorneys could indeed be debt collectors, because the phrase "debt collector" was not limited. It previously was limited so that it specifically excluded attorneys. But the change in the statute simply eliminated the exception. Thus, the legal principle that "if a word is not limited – then it is not limited" is illustrated by the very history of the FDCPA.

It is ironic that now Jerman wants to abandon the legal principle that has gotten her this far in this case. The legal principle of interpreting the word "communication" without limitation since there was no limitation within the statute, enabled Jerman to survive Carlisle's initial Motion to Dismiss in this case. Also, the legal principle of interpreting the word "debt collector" without limitation since there is no limitation specifically in the FDCPA, enabled Jerman to successfully argue that Carlisle is a debt collector,

even though Carlisle is an attorney. Now Jerman wants to jettison and abandon this legal principle.

Intentional.

Petitioner argues that the insertion of the words "in writing" was done intentionally by Respondent (Carlisle) and therefore Respondent does not meet the "unintentional" part of the bona fide error defense. However, this portion of the FDCPA states that there must be an "unintentional *violation*", not an unintentional "*act*". Even assuming that the insertion of the words "in writing" was intentionally done, Carlisle did not make an intentional "violation". To the contrary, Carlisle thought that it was proper and legal to do this. Even if this was an error, it was done on the basis of legal research and a legal opinion by the Defendant attorney (Carlisle). Thus, the "violation" was not done "intentionally".[16]

The Circuit cases of *Neilsen* and *Jerman* and the District Court case of *Jerman* all considered this "intentional" argument that Petitioner is making. All these Courts had no trouble in ruling that there is a difference between an intentional violation and an intentional act. These Courts noted that the debt

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[16] *Safeco* points out this principle of law. In *Safeco* the complained of act of failing to give a certain notice was done intentionally. However, the Supreme Court held that there was no willful violation because the defendant did legal research and came to the legal conclusion that such notice was not required.

collector must only show that the violation was unintentional, not that the act itself was unintentional. *Neilsen,* at 641, *Jerman* (Cir.) at 477, *Jerman* (Dist.) at 693, 695.

Procedures.

The FDCPA bona fide error defense requires that there be established procedures. Petitioner argues that it is not logical to think in terms of "procedures" to avoid legal errors.[17] The District Court and the 6th Circuit in *Jerman* had no problem in rejecting this argument and found that there are indeed procedures that can be used to avoid legal errors.[18] Numerous other courts have ruled likewise. See *Johnson,* at 1123-24, which cited five other cases and noted that "this [procedures] requirement is not incompatible with application of bona fide error defense to mistake of law".

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[17] Petitioner argues that adapting procedures is simply not compatible with an error of law defense. Understandably, neither Petitioner nor her *amici* parties cite any cases which so hold. To the contrary, numerous cases cited throughout all Briefs have factually ruled on the adequacy of the procedures used by the debt collector in particular cases, but more of them held that this procedures concept was legally incompatible with an error of law defense.

[18] Some of these procedures are discussed in the 6th Circuit opinion at *Jerman* page 478 and the District Court opinion at 695.

Ignorance of the law.

Petitioner uses the phrase "ignorance of the law is no excuse." This is not the issue. Parties and attorneys may disagree as to the law, but this does not mean they are ignorant of the law. Even if a court ultimately agrees with one attorney and disagrees with another attorney, this does not mean that one was ignorant of the law and the other was not. A dissenting judge disagrees with the majority, but this does not mean that he is ignorant of the law. He just disagrees as to what the law is.

Petitioner uses this phrase as a basis for trying to convince this Court to rule for her. She equates "ignorance of the law is no excuse" with "error of law is not a defense." She then argues that since ignorance of the law is no excuse, then error of law is not a defense. If ignorance of the law is no excuse as used in this sense, then *Safeco* would not have been decided as it was.

Abusive and unethical.

Petitioner and her *amici* parties state that the FDCPA is intended to curb "abusive and unethical acts." They then argue what the attorney (Carlisle) did was a violation of FDCPA and therefore constitutes "an abusive and unethical act." The "act" involved in this case is that Carlisle did legal research and arrived at a considered legal opinion. As it turns out, the Court basically told Carlisle that he was mistaken in his legal opinion and therefore committed an

"error of law." The question presented in this appeal is whether Carlisle should be liable for having done such.

Doing legal research and coming to a legal opinion, even if that opinion is wrong, is hardly "abusive and unethical." In fact, it is the opposite of that. It is the exact thing that an attorney would in good faith do. Indeed, it is the same thing that Jerman and her attorneys and *amici* parties have done. They turned this matter over to their attorneys who have all done legal research and arrived at a legal opinion. Even if their opinion is wrong, they should not be found liable for having done so. Up until this point in this case, Jerman and her attorneys have been "wrong" and have committed "errors of law", since the Courts have ruled against them.

If the "act" done by Carlisle is abusive and unethical, then surely Jerman, her attorneys, and *amici* parties have done this to this point in this case. Thus, under this theory, they should be liable pursuant to Rule 11. By their own definition, they have thus far acted in an "abusive and unethical" manner. More generally, in *any case* if researching the law and forming a legal opinion is "abusive and unethical", then any time a party loses a case, that party should be assessed sanctions under Rule 11.

FTC Opinion.

Petitioner argues that if an attorney/debt collector (or a non-lawyer debt collector or an unsophisticated person) suspects that there might be an error of law in what he is contemplating doing (or not doing), his recourse (in fact his exclusive and only recourse) is to contact FTC and get an FTC Opinion before proceeding any further.[19] The debt collector must say "Wait a minute. Before I do this thing, I will write the FTC and get an FTC Opinion."

FTC Opinions concerning FDCPA are very, very rare. Since the enactment of the FDCPA in 1977, there have been a total of four Opinions rendered by FTC concerning FDCPA. This fact alone reveals that persons have not considered using the FTC Opinion defense as a prelude to taking action. See the FTC website at www.ftc.gov/os/statutes/fdcpajump.shtm. Indeed, there was only one (1) FTC Opinion concerning FDCPA in the first 23 years of the FDCPA's existence. Furthermore, the lack (virtual nonexistence) of FTC Opinions concerning FDCPA matters, shows that attorneys and the public in general do not use this FTC Opinion route in the manner and for the purpose suggested by Petitioner.

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[19] There is mention in *Safeco* about getting an opinion from FTC concerning an FCRA matter. Safeco Insurance Company did not seek an FTC opinion, even though it could have. But the Supreme Court did not seem disturbed that the insurance company could have gone to the FTC but did not. The availability of an FTC Opinion did not seem to matter at all.

The time that it takes to get an FTC Opinion is way too long and infrequent to make this FTC Opinion route a meaningful and practical consideration in the real world. The FTC web site shows that it takes about 16 months to even get an FTC Opinion. For instance, the FTC Opinion rendered on June 23, 2009, was pursuant to a request on February 11, 2008, for such Opinion – about 16½ months.

Furthermore, the FTC refuses to issue an Opinion for most every request that is made. This is demonstrated by a review of the FTC web site where there are about 100 Staff opinions for April 1988-May 2002. See www.ftc.gov/os/statutes/fdcpa/letters.shtm. It appears Staff opinions were issued because the FTC declined to issue an official FTC Opinion. There are currently no FTC Opinions concerning the issue in this case. There are no Staff opinions either.[20] Thus, the attorney/debt collector in this case (Carlisle) would not have been able to get an FTC answer to his dilemma by checking with the FTC. Of course, a Staff opinion does not qualify under the FTC Opinion defense portion of FDCPA.[21]

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[20] It appears that the FTC has even stopped the Staff from issuing Staff interpretations of the FDCPA. See the above web site where the FTC stated "[e]xcept in unusual circumstances the staff will no longer issue informal written interpretations of the FDCPA." Indeed, it appears there have been no Staff opinions or interpretations since May 2002.

[21] In fact, a debt collector was found liable in part for relying on a Staff Opinion in *Hulshizer, supra*.

Thus, it is highly likely that if Carlisle had requested an FTC Opinion that such request would not have been granted. It is also likely that if the request had been granted that the time it would have taken to actually get an FTC Opinion would have been so long that it would not have been feasible to go this route.

Petitioner argues that the only error of law defense that is available under FDCPA is via FTC Opinion. Even if the FTC is wrong in its opinion, such FTC Opinion is still a valid defense; thus, an error of law is a defense, as long as it is committed by FTC.[22] However, Petitioner and her *amici* parties have not cited a single case where an FTC Opinion has been used as a defense. More specifically to the facts of this case, they have not cited a single case where FTC was wrong as a matter of law but such FTC Opinion was still a defense.

Concept of FDCPA is that an error of law is a defense.

Petitioner and others argue that in enacting the FDCPA, Congress did so with the concept that an

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[22] Error of law is a defense under two provisions of FDCPA. There is no liability if a debt collector commits a violation of FDCPA but such violation is (1) based on an FTC Opinion, even if the FTC Opinion is wrong as a matter of law, i.e. even if there is an error of law [15 U.S.C. Section 1692k(e)] or (2) not intentional and results from a bona fide error notwithstanding the maintenance of procedures adapted to avoid such error, i.e. even if there is an error of law [15 U.S.C. Section 1692k(c)].

error of law should not be a defense. To the contrary, other than rejecting such a concept, Congress embraced the concept that an error of law should be a defense. The reason for this statement is as follows:

Section 1692k(e) provides that reliance on an FTC Opinion is a defense to an FDCPA action. This is true whether the FTC Opinion is right or wrong.[23] It is a defense even if the FTC is wrong as a matter of law. Reliance on an FTC Opinion is still a defense. Congress recognized that an error of law conceptually can form the basis of a valid defense. Indeed, that is the very cornerstone and basis of 1692k(e). The only time that an FTC Opinion defense is needed is when the FTC is wrong as a matter of law. This is so, because if the FTC is right, then there simply is no error of law to begin with. It is only when the FTC is wrong as a matter of law (i.e. there is an error of law) that the FTC Opinion defense is needed. The FTC Opinion defense is based on the concept that an error of law is and should be a defense. Thus, Congress has not rejected the concept of an error of law being a defense.

Page 17 of Petitioner's Brief states that "providing debt collectors with a mistake of law defense under FDCPA would be a very unexpected thing for Congress to do." To the contrary, this is

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[23] It is still a defense, even if the act was done pursuant on FTC Opinion that is subsequently declared incorrect by a court. 15 U.S.C. Section 1692k(e).

exactly what FTC Opinion defense in FDCPA does. Even if the FTC is wrong as a matter of law, this is still a defense. Section 1692k(e) even bolsters this point by further specifically stating that FTC Opinion is still a defense even if an FTC Opinion is declared incorrect as a matter of law by a court.

Petitioner's interpretation leads to impractical results.

Following established cases.

Under Petitioner's theory, if there was a long, established line of cases (both District and Circuit) as to a point of law and a debt collector took that position, but that position was overturned on appeal to the U.S. Supreme Court, then that debt collector would be liable. Whereas, if a debt collector took a position in accordance with an FTC Opinion, the debt collector would not be liable, even if that position was overturned by a court. The same point can be made even if there was a U.S. Supreme Court ruling on a position, because that position could be overturned by a subsequent U.S. Supreme Court ruling.[24]

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[24] It should be noted that FTC Opinions are decided by Commissioners, who are not necessarily attorneys. Yet under Petitioner's theory, an FTC Opinion as to a legal issue is vaulted over opinions of attorneys and judges, even the U.S. Supreme Court.

Quandary for the reader of the FDCPA.

Under Petitioner's version of the statute, how does a reader of the statute conclude that errors of fact are included, yet somehow "errors of law" are excluded? This is particularly pertinent when considered via the mind set of an "unsophisticated" person, which is the standard by which FDCPA violations are judged. The public, lawyers, debt collectors and unsophisticated persons should not be put to the requirement of somehow discerning what is *not* in the statute. Indeed, to conclude that errors of law are not included within the word "error" is not only a mistake, but should not equitably or legally mandate liability for doing so.

Mixed errors of fact or law.

Under Petitioner's version of the statute, how is a *mixed* error of law and fact judged? Just as issues of law and fact are many times mixed, it could very well be that errors are mixed and intertwined. Under Petitioner's version, this would be an impossible task to unravel. Under the Respondent's version, it is not. Under Respondent's version, an error is an error, regardless of whether it is fact, law, or mixed.

Likewise, under Petitioner's version, what happens when it is impossible to determine if the error is an error of law or an error of fact? Courts have noted the difficulty in distinguishing between an issue of fact from an issue of law. See *Miller v. Fenton*, 474 U.S. 104, 113 (1985) where the Supreme Court noted

that "the appropriate methodology for distinguishing questions of fact from questions of law has been, to say the least, elusive", and the Court has "yet to arrive at a rule or principle that will unerringly distinguish a factual finding from a legal conclusion."

The same error can be one of fact or law.

Petitioner's version of the statute also mandates that it is necessary for there to be a determination as to when an error is an error of fact and when an error is an error of law. For instance, in regard to the facts of the instant case, what if a lawyer researched this point and simply made an error in doing his research? The attorney doing research then came up with a conclusion that the words "in writing" were proper to include in the letter where he did. However, he simply made an error by inserting in a wrong code section or phrase or something which resulted in him not finding law which stated that the words "in writing" were not proper to put in the letter. Perhaps the attorney in doing the legal research included a phrase but did not include the right phrase. There could indeed be a factual error in doing legal research. If the words "in writing" were inserted by mistake in the attorney/debt collector letter by the secretary in typing the letter, then this would be an error of fact. Perhaps the secretary inserted "in writing" because the secretary thought that these words had been inadvertently omitted in the draft given to the secretary, since the words "in writing" were in other portions of the letter. This would be an

error of fact. The point here is that the same "error" can be either an error of law or an error of fact. Under Petitioner's theory, one is a defense where the other is not. This illustrates that Petitioner's theory is not logical, consistent, or desirable.

Bona fide.

Petitioner argues that if an error of law is allowed as a defense, then a debt collector/attorney can just dream up a position and then be protected, and the floodgates will be opened for any ridiculous error than may be imagined by the debt collector. This is not true. There are several safeguards for such a fear. The position taken must be genuine, in good faith, and not frivolous. Indeed, the most basic requirement for the bona fide error defense is that the position must be "bona fide."

Bona fide error of law is and should be a defense to "additional" damages under FDCPA.

The provision of "additional" damages under FDCPA illustrates the fallacy of Petitioner's position. The FDCPA uses the unusual term of "additional damages" to delineate a category of damages that are recoverable under FDCPA. Section 1692k(a)(2)(A) states that a consumer can recover from a debt collector who violates FDCPA

> in the case of any action by an individual, such additional damages as the court may allow, but not exceeding $1,000.00;

The elements for awarding these "additional" damages are set out in Section 1692k(b)(1) which states that

> In determining the amount of liability in any action under subsection (a)(2)(A), the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which such noncompliance was intentional;

Cases hold that "additional damages" under FDCPA are punitive damages. *Johnson v. Eaton*, 80 F.3d 148, 152 (5th Cir. 1996) specifically calls these "additional damages" as "punitive damages", and states that these

> 'additional' or punitive damages are designed to punish Eaton [debt collector] for his wrongful acts.

Thrasher v. Cardholder Services, 74 F. Supp. 2d 691, n. 2 (S. D. Miss. 1999) ruled that these "additional" damages are actually a "limitation on punitive damages". *Thomas v. Pierce,* 967 F. Supp. 507 (N.D. Ga. 1997) provides that these "additional" damages are intended for "reprehensible conduct", to "punish and deter" wrongdoers, are judged by the "very factors a court would address when considering punitive damages," and are "punitive in nature." At least two federal publications also label these FDCPA "additional damages" as punitive damages. See Consumer Compliance Handbook published by the Federal Reserve Board at www.federalreserve.gov/boarddocs/

supmanualcch/200601/fairdebt.pdf and FDIC Compliance Handbook at www.fdic.gov/regulations/compliance/handbook/manual%20403-404.pdf, both of which state that the damages in Section 1692k(a)(2) are properly called "punitive damages".

The U.S. Brief appears to be the only opposing brief that discusses the penalty aspect of the FDCPA, and it recognizes that the FDCPA does indeed contain a penalty provision. U.S. comments on page 14 that there are a "general set of penalties" under FDCPA. The only "penalty" under FDCPA to which this could refer is "additional" damages. FDCPA provides for three categories of damages – actual damage, additional damage, and attorney fees. Actual damage and attorney fees are compensatory damages, not penalty damages. "Additional" damage is the only other category of damages under FDCPA. Thus, the only penalty damage to which U.S. could be referring is "additional" damage. Consequently, even U.S. refers to "additional" damages as "penalty" damages that penalize or punish the offending debt collector, not compensate the consumer debtor for his loses.

Punitive damages are not recoverable where a person has acted on advice of an expert, including an attorney, particularly where one has acted on the basis of a legal opinion, even if that opinion or advice is wrong. Thus, an error of law is clearly a defense to

"additional" damages under FDCPA.[25] Petitioner's position would prevent the use of reliance on advice of an attorney as a defense to punitive (additional) damages. This is contrary to well established state and federal law.[26]

CONCLUSION

The Judgment of the Sixth Circuit Court of Appeals should be affirmed.

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[25] On page 8 U.S. acknowledges that BFE is a defense to a civil penalty and states that "Congress provided that ignorance of the law would shield a debt collector only from civil penalties."

[26] For example, see *Farias v. Instructional Systems, Inc.*, 259 F.3d 91, 102 (2nd Cir. 2001); *Henderson v. USF&G*, 695 F.2d 109, 114 (5th Cir. 1983); *Mahurkar v. C.R. Bard, Inc.*, 79 F.3d 1572, 1579 (Fed. Cir. 1996); *Murphree v. Federal Ins. Co.*, 707 So. 2d 523 (Miss. 1997).

AMICUS CURIAE BRIEF

No. 08-1200

IN THE

Supreme Court of the United States

KAREN L. JERMAN,

Petitioner,

v.

CARLISLE, MCNELLIE, RINI, KRAMER & ULRICH LPA AND ADRIENNE S. FOSTER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL ASSOCIATION OF RETAIL COLLECTION ATTORNEYS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

The National Association of Retail Collection Attorneys (NARCA) is a nationwide, not-for-profit trade association of debt-collection attorneys. NARCA's members include over 700 law firms, all of whom must meet association standards designed to ensure experience and professionalism. Members are also guided by NARCA's code of ethics, which imposes an obligation of self-discipline beyond the requirements of pertinent laws and regulations.

NARCA members are regularly involved in the lawful collection of past-due consumer debts and must therefore interpret and apply the often-unsettled requirements of applicable collection law, principally the Fair Debt Collection Practices Act (FDCPA or Act), Pub. L. No. 95-109, 91 Stat. 874 (1977). NARCA has a strong interest in ensuring that the Act's bona fide error defense, 15 U.S.C. § 1692k(c), is interpreted in a way that allows collection attorneys to discharge their ethical duty to advance their clients' legitimate interests—within the bounds of existing law—without constantly exposing themselves to substantial personal liability. NARCA has participated as *amicus curiae* in other cases involving the interpretation or application of the Act. *See, e.g.*, *Heintz* v. *Jenkins*, 514 U.S. 291 (1995); *Guerrero* v. *RJM Acquisitions LLC*, 499 F.3d 926 (9th Cir. 2007).[1]

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[1] No counsel for a party authored any part of this brief—the filing of which has been consented to by all parties—and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of the brief.

SUMMARY OF ARGUMENT

Petitioner Karen Jerman's request that this Court amend the FDCPA's bona fide error provision, 15 U.S.C. § 1692k(c), by inserting an atextual limitation regarding the types of errors that the provision encompasses, should be rejected.

I. Excluding legal errors from the scope of § 1692k(c) would interfere with collection attorneys' discharge of their ethical duty to advance their clients' legitimate interests within the confines of existing law. Collection law is often unsettled, with questions about whether a particular practice violates the Act either unaddressed by courts or answered in different ways by different courts. Under Jerman's view, an attorney facing such uncertainty would—unless she was willing to expose herself to the risk of strict personal liability—have to resolve it contrary to her clients' legitimate interests, even if there was substantial authority (even binding in-circuit authority) holding that the relevant practice was permitted by the Act. Particularly given that FDCPA liability can be substantial, this Court should hesitate to conclude that Congress intended to force such an untenable choice, and to punish attorneys who act in good faith to discharge their professional obligation to their clients. Such hesitation is not only consistent with the Court's refusal to impose a similar choice under the judicially created qualified-immunity doctrine, but also appropriate given that establishment of attorneys' ethical duties is the traditional province of the judiciary rather than the legislature, and of the States rather than the federal government.

The countervailing policy arguments that Jerman and the government advance are without merit. For example, debt collectors would still have an incentive to

seek advisory opinions from the Federal Trade Commission (FTC or Commission), as that is the only path to categorical immunity from liability. And Jerman offers no empirical support for her claim that respondents' view would discourage private FDCPA lawsuits.

II. Jerman's proposed judicial gloss is also inconsistent with the Act's plain language. By its terms, § 1692k(c) applies to "error[s]," without any qualification regarding the particular type of error (legal, clerical, etc.). Moreover, Congress plainly knows how to express an intent to exclude legal errors from a bona fide error defense, because the bona fide error provision in the Truth-in-Lending Act (TILA), though otherwise identical to § 1692k(c), specifically excludes most legal errors. The historical argument that Jerman and the government advance in response to this point fails because there was in fact no judicial consensus regarding the meaning of the TILA provision that Congress could have intended to ratify in adopting the FDCPA.

Nor does the requirement in § 1692k(c) that a violation be "not intentional" indicate an intent to exclude legal errors. Congress sometimes uses "intentional" as a synonym for "willful"—a word that Jerman and the government concede would allow for excusal of legal errors—and doing so here would be entirely sensible given the Act's myriad requirements and the substantial liability imposed for violating them.

Finally, the "procedures reasonably adapted" requirement is completely consistent with the inclusion of legal errors in § 1692k(c). There are certainly procedures that can minimize the chance of such errors, and Jerman's suggestion that courts have encountered particular difficulty in applying § 1692k(c) to legal errors is both wrong and irrelevant.

ARGUMENT

I. EXCLUDING LEGAL ERRORS FROM THE SCOPE OF § 1692k(c) WOULD INTERFERE WITH ATTORNEYS' ABILITY TO DISCHARGE THEIR ETHICAL OBLIGATION TO THEIR CLIENTS

A. Collection Attorneys Should Be Able To Honor Their Professional Duty To Advance Their Clients' Legitimate Interests Within The Bounds Of Existing Law Without Exposing Themselves To Substantial Personal Liability

The Fair Debt Collection Practices Act imposes a multitude of requirements on those engaged in the lawful practice of collecting consumer debts from individuals who have voluntarily incurred those debts in exchange for goods or services. The Act also imposes civil liability for violations of these requirements, including actual and statutory damages, plus costs and reasonable attorney's fees. *See* 15 U.S.C. § 1692k.[2] To ensure that liability did not fall on those who sought in good faith to comply with the Act, Congress provided an affirmative defense for violations that are "not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." *Id.* § 1692k(c).

Petitioner Karen Jerman and her amici ask the Court to add an atextual limitation to this defense that would exclude from its scope bona fide legal errors, i.e., good-faith errors regarding what is required by the Act

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[2] Because this liability can be imposed even when plaintiffs do not prove any *mens rea*, several circuits have described the Act as a strict-liability statute. *See, e.g., Clark* v. *Capital Credit & Collection Servs., Inc.*, 460 F.3d 1162, 1175 (9th Cir. 2006).

(or by other laws that can trigger an FDCPA violation). Among the many reasons to reject that request is that Jerman's proposed judicial amendment to the Act would interfere with attorneys' ability to discharge their ethical obligation to advance their clients' legitimate interests.

1. Like all attorneys, collection attorneys have a professional duty to represent their clients zealously and advance the clients' legitimate interests to the extent the law allows. *See, e.g.*, ABA Model R. Prof'l Conduct, Preamble (2004) (noting "the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law"). In the area of collection law, however (as in many other areas), it is often unclear precisely what "the law allows," either because a particular question has not been answered or because different courts have answered it in different ways. Under Jerman's interpretation, an attorney facing such uncertainty would either have to expose herself to strict personal liability under the Act or else resolve the uncertainty contrary to her client's interests, even where there was substantial authority for the position that would advance those interests. That interpretation should be rejected. Congress provided protection from liability for those who err in good faith. The statute should not be judicially rewritten to remove that protection from attorneys who act to advance their clients' legitimate interests—as their professional duties require them to do—when they have a good-faith legal basis for doing so.

a. Collection law is characterized by a number of legal questions that are unresolved or the subject of conflicting judicial decisions. For example, the Ninth Circuit has held that the FDCPA does not apply to a debt collector's communications with a debtor's attor-

ney. *See Guerrero* v. *RJM Acquisitions LLC*, 499 F.3d 926, 936 (9th Cir. 2007) (per curiam) ("[W]e hold that communications directed only to a debtor's attorney, and unaccompanied by any threat to contact the debtor, are not actionable under the Act." (footnote omitted)). The court reasoned that "the Act's purpose is to protect unsophisticated debtors from abusive debt collectors, and once a consumer obtains this protection by procuring legal counsel, the Act's protections become superfluous and therefore its provisions no longer apply." *Id.* at 929. The Second Circuit has expressed a similar view, though without actually deciding the issue. *See Kropelnicki* v. *Siegel*, 290 F.3d 118, 128 (2d Cir. 2002). Two other circuits, however, have reached the opposite conclusion. *See Sayyed* v. *Wolpoff & Abramson*, 485 F.3d 226, 234 (4th Cir. 2007) ("[P]lainly, the FDCPA covers communications to a debtor's attorney."); *Evory* v. *RJM Acquisitions Funding L.L.C.*, 505 F.3d 769, 773-775 (7th Cir. 2007). Other lower courts are likewise divided. *Compare Duraney* v. *Washington Mut. Bank F.A.*, No. 2:07-cv-13, 2008 WL 4204821, at *14 (W.D. Pa. Sept. 11, 2008) (holding that communications with counsel are not covered by the Act), *with Capital Credit & Collection Serv., Inc.* v. *Armani*, 206 P.3d 1114, 1119-1120 (Or. Ct. App. 2009) (holding the opposite).

Under Jerman's crabbed reading of the Act, this deep division of authority would often pose a severe dilemma for collection attorneys. An attorney's client will frequently benefit from having the attorney contact the debtor's counsel, to discuss a settlement or otherwise to move the case closer to resolution. *See Campuzano-Burgos* v. *Midland Credit Mgmt., Inc.*, 550 F.3d 294, 299 (3d Cir. 2008) (citing and following other circuits in observing that settlement efforts can benefit both sides and are consistent with the purposes of the

Act). But collection attorneys would be deterred from pursuing their clients' interests in this sensible fashion if they knew that their settlement overtures might turn them into defendants in an FDCPA lawsuit.

The dilemma is most clearly presented for an attorney practicing in a circuit that has not addressed the issue. That attorney would not have the benefit of any binding precedent, but could point to substantial authority suggesting that her communications with a debtor's counsel are not covered by the Act. Yet the attorney would have to choose between: (1) disregarding her ethical obligation to advance her client's interest by acting in accordance with that substantial authority, and (2) accepting the risk of being held strictly liable if, in an ensuing FDCPA lawsuit against her regarding the content of her communications with debtor's counsel, the court ultimately chose the other side of the divide regarding the Act's coverage of such communications.[3]

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[3] It is no answer to say that this choice is not actually onerous because the attorney would need to refrain only from communicating with debtor's counsel in an abusive or misleading way. The FDCPA's broad and often vague requirements can be violated by engaging in conduct that, under normal circumstances, would not be considered remotely abusive or misleading. In *Guerrero*, for example, the communication consisted of a letter to the debtor's attorney stating that—per the attorney's request—the debt at issue was being verified. "Apparently taking every precaution to comply with the Act, [the author] included in its letter ... the statement 'This is an attempt to collect a debt[,]' ... language [that] is *required* by the Act in all initial communications[.]" *Guerrero*, 499 F.3d at 931 (emphasis added). Because the letter was not an initial communication, however, two of the four judges who heard the case (the district judge and the dissenter on the court of appeals) concluded that the letter violated 15 U.S.C. § 1692g(b).

Even an attorney in the Ninth Circuit could not, under Jerman's view, take comfort from the thought that *Guerrero* permits her to communicate with debtors' counsel, when doing so was in her clients' interests, without fear of exposing herself to FDCPA liability. A debtor, after all, could still bring suit against the attorney, pointing to out-of-circuit decisions and arguing that *Guerrero* is wrong and should be overruled. If the en banc Ninth Circuit accepted that argument, the attorney who had relied in good faith on binding in-circuit precedent would nonetheless face liability under the Act. Or, of course, this Court could at any point resolve the circuit conflict—and if the Court held that *Guerrero* and similar decisions were wrong, then attorneys in the Ninth Circuit (and perhaps elsewhere) who had followed *Guerrero* or similar in-circuit authority in good faith would suddenly find themselves exposed to liability, unless the Act's statute of limitations (15 U.S.C. § 1692k(d)) had already run. There is no basis to conclude that Congress intended such a harsh result.

b. This very case provides another example of how Jerman's position would force attorneys to choose between avoiding exposure to strict personal liability and discharging their professional obligation to advance their clients' legitimate interests within the limits of existing law. Jerman alleged that respondents violated the Act by stating in their validation notice that in order to dispute the validity of her debt, she had to do so in writing. Pet. App. 3a. The courts of appeals are divided—and were when respondents sent the validation notice to Jerman—over whether in fact 15 U.S.C. § 1692g(a)(3) requires disputes to be in writing. The Third Circuit, the first court of appeals to address the issue, held that there is such a requirement. *See Graziano* v. *Harrison*, 950 F.2d 107, 111-112 (3d Cir.

1991). Fourteen years later, the Ninth Circuit took the opposite position. *See Camacho* v. *Bridgeport Fin. Inc.*, 430 F.3d 1078, 1082 (9th Cir. 2005).[4] And here again, district courts in other circuits are divided on the question. *Compare, e.g., Wallace* v. *Capital One Bank*, 168 F. Supp. 2d 526, 529 (D. Md. 2001) (finding an in-writing requirement), *with Baez* v. *Wagner & Hunt, P.A.*, 442 F. Supp. 2d 1273, 1276-1277 (S.D. Fla. 2006) (finding no such requirement).

In considering the issue, the Third Circuit explained that "there are strong reasons to prefer that a dispute of a debt collection be in writing: a writing creates a lasting record of the fact that the debt has been disputed, and thus avoids a source of potential conflicts." *Graziano*, 950 F.2d at 112. Such a "lasting record" benefits debt collectors by reducing the chance of later false claims by debtors (perhaps in the context of an FDCPA action) that they disputed a debt orally. Yet under Jerman's proposed judicial revision of the Act, attorneys could not secure this legitimate benefit for clients without risking personal liability. Again, this would be true for attorneys in circuits where the issue had not been resolved or even had been resolved in favor of an in-writing requirement. An attorney would simply have to explain to clients that despite her good-faith basis for believing that an in-writing requirement is lawful, the risk of a court concluding otherwise had deterred her from discharging her ethical obligation to advance those clients' legitimate interests.

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[4] Jerman wrongly states (Br. 6 n.1) that *Camacho* is "the only on-point court of appeals decision to address the question." As both *Graziano* itself and extensive subsequent case law confirm, the Third Circuit squarely decided this issue.

c. Nor is this problem limited to conflicting interpretations of the FDCPA itself, because violations of the Act can turn on other laws, including state laws. For example, several courts have held that it is a violation of the Act to file a lawsuit to recover a debt (or even to suggest an intent to do so) if the applicable statute of limitations has expired. *See, e.g.*, *Freyermuth* v. *Credit Bureau Servs., Inc.*, 248 F.3d 767, 771 (8th Cir. 2001); *Gervais* v. *Riddle & Assocs., P.C.*, 479 F. Supp. 2d 270, 273 (D. Conn. 2007) (citing *Stepney* v. *Outsourcing Solutions, Inc.*, No. 97 C 5288, 1997 WL 722972, at *5 (N.D. Ill. Nov. 13, 1997), and *Kimber* v. *Federal Fin. Corp.*, 668 F. Supp. 1480, 1488-1490 (M.D. Ala. 1987)). It is often far from clear, however, whether a claim to recover a particular debt would be time-barred. For example, in *Simmons* v. *Miller*, 970 F. Supp. 661 (S.D. Ind. 1997), *abrogated on other grounds by Gearing* v. *Check Brokerage Corp.*, 233 F.3d 469, 472 (7th Cir. 2000), the court noted that Indiana law was unresolved regarding whether a particular type of claim for recovery of a debt had a two-year or a six-year statute of limitations, *see* 970 F. Supp. at 664. An attorney whose client wanted to take otherwise-lawful action to recover a four-year-old debt governed by Indiana law could advance her client's interests only by taking on the risk that if it was subsequently determined as a matter of state law that the shorter limitations period applied, she would be subject to liability under the FDCPA, and would have no viable defense.[5]

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[5] The *Simmons* court concluded that the bona fide error defense would normally protect attorneys from liability for seeking to recover a stale debt. *See* 970 F. Supp. at 664 (citing Indiana R. Prof'l Conduct 3.1); *accord, e.g.*, *Almand* v. *Reynolds & Robin, P.C.*, 485 F. Supp. 2d 1361, 1365 (M.D. Ga. 2007) (finding bona fide

d. A collection attorney's liability in these scenarios can be substantial. The Act provides for statutory and actual damages, including statutory damages in class actions up to the lesser of $500,000 or one percent of the collector's net worth. *See* 15 U.S.C. § 1692k(a)(2)(B). The Act also provides for costs and reasonable attorney's fees—recovery of which is mandatory when an FDCPA violation is proved. *Id.* § 1692k(a)(3). Those fees can be high, even if the actual and statutory damages are not. In *Guerrero*, for example, the district court awarded over $45,000 in fees and costs even though the plaintiff recovered only $2,545 in damages. *See* 499 F.3d at 932; *see also id.* at 941 (setting aside the fee award in light of the reversal as to the underlying FDCPA violation). Similarly, the court in *Norton* v. *Wilshire Credit Corp.*, 36 F. Supp. 2d 216, 221 (D.N.J. 1999), awarded almost $58,000 in fees and costs even though the plaintiff's net recovery was $4,150. These cases belie Jerman's cavalier assertion that the FDCPA imposes only "modest financial liability." Pet. Br. 9; *see also id.* at 35 (ignoring attorney's fees and actual damages in discussing FDCPA liability); *id.* at 4 (ignoring fees); *compare id.* at 31 (describing the acquisition of $250—one quarter of the maximum statutory damages in an individual FDCPA case—as "a very real financial benefit").

e. The fact that Jerman's interpretation of the Act would cause the interference described above with attorneys' ethical obligations to their clients makes it

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error defense satisfied where "there is no controlling or even persuasive authority from Georgia's highest courts regarding which statute of limitations applies to Plaintiff's debt"). Under Jerman's view, there would be no such protection.

particularly inappropriate to adopt that interpretation absent clear evidence that Congress intended it. Establishment of professional standards for the bar and oversight of lawyers' conduct are traditionally the all-but-exclusive province of the judiciary. *See Paul E. Iacono Structural Eng'r, Inc.* v. *Humphrey*, 722 F.2d 435, 439 (9th Cir. 1983) ("[T]he regulation of lawyer conduct is the province of the courts, not Congress."); *Smith County Educ. Ass'n* v. *Anderson*, 676 S.W.2d 328, 334 (Tenn. 1984) ("The Legislature ... is without authority to enact laws which impair the attorney's ability to fulfill his ethical duties[.]"), *quoted in Dunn* v. *Alabama State Univ. Bd. of Trs.*, 628 So. 2d 519, 529 (Ala. 1993); *Minnesota Star & Tribune Co.* v. *Housing & Redev. Auth.*, 246 N.W.2d 448, 452 (Minn. 1976) (similar); *In re Advisory Comm. on Prof'l Ethics Opinion 621*, 608 A.2d 880, 886 (N.J. 1992) (similar). The Court therefore should not conclude that Congress intended to intrude in this area unless that conclusion is dictated by statutory text (which here it plainly is not). *Cf. Miller* v. *French*, 530 U.S. 327, 336 (2000) ("[T]he Government asserts that reading [18 U.S.C.] § 3626(e)(2) to remove [district courts' traditional] equitable power would raise serious separation of powers questions, and therefore should be avoided under the canon of constitutional doubt. ... [W]e do not lightly assume that Congress meant to restrict the equitable powers of the federal courts, and we agree that constitutionally doubtful constructions should be avoided where fairly possible." (internal quotation marks omitted)).

As Jerman notes, oversight of attorneys is also traditionally the province of the States. Pet. Br. 27; *see also, e.g.*, *ABA* v. *FTC*, 430 F.3d 457, 471 (D.C. Cir. 2005). And this Court has stated that "Congress should make its intention clear and manifest if it intends to

pre-empt the historic powers of the States." *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989) (internal quotation marks omitted). Congress has not done so here.

2. As discussed, in situations like these attorneys would be subject to civil liability even when extant judicial precedent gave them a substantial good-faith basis to conclude that the relevant conduct was lawful. This Court has prohibited the imposition of monetary liability in closely analogous circumstances. Specifically, notwithstanding the absence of any statutory provision for the defense, the Court has held that qualified immunity protects government officials from liability for money damages when there are conflicting judicial decisions on the relevant issue: "If judges ... disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson* v. *Layne*, 526 U.S. 603, 618 (1999). The same should be true for purposes of the bona fide error defense.

The government argues in response that the qualified-immunity analogy is inapt because the "'purpose of qualified immunity is to protect the State and its officials from overenforcement of federal rights,'" and "[t]he FDCPA ... contains no indication that Congress regarded 'overenforcement' as a potential problem." U.S. Br. 18 (quoting *Johnson* v. *Frankel*, 520 U.S. 911, 919 (1997)). The government is right about the purpose of qualified immunity but wrong about whether Congress was concerned about "overenforcement" of the Act. Congress's inclusion in the Act of not one but two mechanisms by which debt collectors can avoid liability (*see* 15 U.S.C. § 1692k(c), (e)) strongly suggests that Congress was indeed concerned about "overenforcement." Moreover, in the same section imposing liability

for FDCPA violations, Congress provided for fee-shifting to *defendants* "[o]n a finding by the court that an action ... was brought in bad faith and for the purpose of harassment." *Id.* § 1692k(a)(3). The purpose of such fee-shifting, too, is to prevent overenforcement. *See* S. Rep. No. 95-382, at 5 (1977) (noting that fee shifting was intended "to protect debt collectors from nuisance lawsuits"). The similarities between the qualified-immunity context and the context of this case thus counsel in favor of the same approach in both.

Jerman asserts, however (Br. 17), that qualified immunity "is premised on the special need to protect government officials' exercise of discretion in the conduct of their public responsibilities, and for that reason has no application to private conduct." Hence, Jerman reasons (*id.*), it "would be a very unexpected thing for Congress to" include legal errors in the bona fide error defense. But this overlooks the fact that the conduct and harm at issue in qualified-immunity cases are often much more severe than those in FDCPA cases. Qualified-immunity cases can involve conduct that "shocks the conscience," as well as harm such as physical injuries (even death) or deprivation of individuals' liberty. *See, e.g.*, *Porter* v. *Osborn*, 546 F.3d 1131, 1132 (9th Cir. 2008) (fatal police shooting alleged to shock the conscience). The conduct at issue in FDCPA cases—here, for example, stating that a debt could be disputed only in writing—is not in the same realm. Nor is the harm from most FDCPA violations remotely comparable to the harm inflicted in most qualified-immunity cases. Indeed, Congress's provision of statutory damages for FDCPA violations suggests a recognition that many such violations cause no actual harm. Given these respects in which FDCPA violations are generally orders of magnitude less severe than those at issue in quali-

fied-immunity cases, it would not be at all "unexpected" (Pet. Br. 17) for Congress to ameliorate the harshness of the Act's strict liability by providing protection for FDCPA violations similar to that which obtains in qualified-immunity cases, notwithstanding that the defendants are private individuals rather than government actors.[6]

Jerman also asserts (Br. 16 & n.3) that qualified immunity is distinguishable because it provides immunity only for money damages and because it is a judicial rather than statutory doctrine. Jerman does not explain, however, why either difference is meaningful. In particular, she provides no basis to conclude that declaratory or injunctive relief plays a role in more than a trivial percentage of FDCPA cases, such that Congress's provision of immunity from such relief would be of consequence. Indeed, "[m]ost courts have found equitable relief unavailable [in] ... private [FDCPA] actions." *Weiss* v. *Regal Collections*, 385 F.3d 337, 341 (3d Cir. 2004). Nor does Jerman offer any reason to hold that the scope of congressionally provided immunity should be determined differently than that of judicially provided immunity (or even explain how any such

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[6] As this discussion should make clear, the issue here is not whether the rationales for qualified immunity are "transferable to private parties," *Wyatt* v. *Cole*, 504 U.S. 158, 168 (1992), because respondents do not seek a judicial expansion of that doctrine. The question is whether Congress intended to provide protection similar to qualified immunity to those who violate the Act only because of a good-faith legal error. As this Court has recognized, there are sound reasons for Congress to have done so: "[P]rinciples of equality and fairness may suggest ... that private citizens who rely unsuspectingly on state laws they ... have no reason to believe are invalid should have some protection from liability." *Id.*

differences would support, rather than undermine, her preferred interpretation). These points thus provide no basis to meaningfully distinguish the qualified-immunity context from this one.

B. The Countervailing Policy Arguments Advanced By Jerman And The Government Are Without Merit

Though not directly addressing the problem discussed above regarding interference with attorneys' ethical obligations, Jerman and the government offer various countervailing policy arguments that they say support their position. None has merit.

First, Jerman argues that interpreting § 1692k(c) to encompass legal errors would put "law-abiding" debt collectors at a competitive disadvantage relative to "aggressive" ones, and create a "race to the bottom that will leave the field to collectors with the fewest scruples." Pet. Br. 32; *accord id.* at 11.[7] But as Jerman subtly concedes, this argument at best would be true *only* when the relevant unsettled question regarding the meaning of the Act—or of another statute that can trigger an FDCPA violation—is ultimately resolved in a way that favors debtors. *See id.* at 31 ("[T]he Sixth Circuit's decision provides a competitive advantage to the collectors who take the more aggressive, *but incorrect*, view of the law." (emphasis added)). As for any ques-

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[7] Jerman's suggestion that collection attorneys can be divided into two groups, "aggressive" and "law-abiding," is wrong and offensive. Collection attorneys (like other attorneys) who "aggressive[ly]" advance their clients' legitimate interests within the bounds of existing law are entirely "law-abiding," and in no way lacking in "scruples."

tion that is instead resolved in a way that does not favor debtors, it is Jerman's interpretation of the Act, rather than respondents', that puts what Jerman refers to as "law-abiding" collectors at a competitive disadvantage. Those collectors will have refused, because of fear of substantial personal liability, to advance their clients' legitimate interests in a manner that the law actually permits, unlike other collectors (those Jerman refers to as "aggressive") who will have correctly interpreted the statute. Jerman's "race to the bottom" argument would thus have merit only if statutory questions were always resolved in debtors' favor. That is obviously not the reality.[8]

Jerman also contends (Br. 32-34) that the Sixth Circuit's construction of the Act would discourage private FDCPA lawsuits, in derogation of Congress's intent to enforce the statute in part through such actions. She provides no empirical evidence to support that contention, however, and specifically cites nothing indicating that private FDCPA actions have declined in any circuit that previously adopted the rule that the court of appeals adopted here. Moreover, several courts have suggested that some private FDCPA actions may well need discouragement: As these courts have noted, there has been "a proliferation of litigation" under the Act. *Federal Home Loan Mortgage Corp.* v. *Lamar*,

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[8] Although lower courts are divided over whether § 1692g(a)(3) requires debts to be disputed in writing, *see supra* pages 8-9, Jerman repeatedly suggests that the issue has been resolved in debtors' favor. *See* Pet. Br. 32 (referring to those who conclude that debts need not be disputed in writing as "correctly construing ... the Act"); *id.* at 5 (describing inclusion of an in-writing requirement as "[i]n conflict with the statute"); *id.* at 3 (similar).

503 F.3d 504, 513 (6th Cir. 2007). This "cottage industry" of "professional plaintiffs," moreover, "does not bring suits to remedy the widespread and serious national problem of abuse that the Senate observed in adopting the legislation, nor to ferret out collection abuse in the form[s the Senate identified]." *Id.* at 513, 514 (citation and internal quotation marks omitted). Rather, these plaintiffs frequently bring "lawsuits based on frivolous misinterpretations or nonsensical assertions of being led astray." *Id.* at 514; *see also, e.g.*, *Turner* v. *Asset Acceptance, LLC*, 302 F. Supp. 2d 56, 59 (E.D.N.Y. 2004). While Jerman laments the possibility that such baseless lawsuits will diminish (though again without offering any supporting evidence), this Court should not similarly be concerned.

The government likewise goes astray in asserting (Br. 19-20) that under the Sixth Circuit's decision, "collectors will have little if any incentive to seek an advisory opinion from the FTC." In fact, debt collectors would continue to have a strong incentive, because under § 1692k(e)—the so-called safe-harbor provision—collectors who rely in good faith on an FTC advisory opinion are *categorically immune* from liability. By contrast, those who forego the advisory-opinion option are not; they instead run the risk that a court will conclude that their errors do not qualify for the bona fide error defense. A court might hold, for example, that the collector's procedures were not "reasonably adapted to prevent" the relevant error, or that, irrespective of procedures, the state of the law or the nature of the error was such that there could not have been a good-faith basis to do (or not to do) what the col-

lector did (or failed to do).[9] The advisory-opinion process would thus continue to have a role under respondents' interpretation of the Act.[10]

The government also contends (Br. 20) that interpreting § 1692k(c) to include legal errors would "undercut[] the FTC's clarification and elaboration of the FDCPA's requirements in a manner at odds with Congress's purpose." But the government cites nothing (either in the statute, its legislative history, or interpretive case law) to suggest that "Congress's purpose" in providing the safe-harbor defense was to benefit the public through FTC "clarification and elaboration." And Congress's placement of that defense in the section of the Act dealing with civil liability indicates that, to the contrary, the purpose of advisory opinions is precisely what the statute says, namely to provide an avenue by which debt collectors can immunize themselves from civil liability. The notion that Congress additionally envisioned a substantial "clarification and elaboration" objective for advisory opinions is particularly dubious given Congress's express bar on FTC rulemaking

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[9] As these possible bases for rejecting an assertion of the bona fide error defense show, the government is wrong in stating (Br. 9) that under respondents' interpretation, "civil liability under the FDCPA would [effectively] be limited to practices that have been clearly held to violate the statute."

[10] Jerman relatedly argues (Br. 29 n.15) that under respondents' view, debt collectors could "evade" the contours of the safe-harbor defense by relying on FTC staff opinions and then invoking the bona fide error defense. But again, such collectors would not enjoy the categorical immunity that comes with satisfying the safe-harbor requirements. In any event, Jerman does not explain why it would be undesirable to encourage debt collectors to look to staff opinions for guidance regarding compliance with the Act.

under the Act, *see* § 1692*l*(d); *see also* S. Rep. No. 95-382, at 6—which has led courts to suggest that Commission advisory opinions are not entitled to any particular weight, *see, e.g.*, *Rosenau* v. *Unifund Corp.*, 539 F.3d 218, 225 (3d Cir. 2008); *Lewis* v. *ACB Bus. Servs., Inc.*, 135 F.3d 389, 399 (6th Cir. 1998) (citing cases).

Finally, the picture that Jerman and the government attempt to paint of a Commission ready and willing to promptly answer questions regarding the Act's coverage is inconsistent with reality. To begin with, the Commission can take months or even longer to issue advisory opinions. For example, the Commission waited over 16 months to issue a short (two-page) opinion regarding the interplay between the FDCPA and another statute. *See* Letter to Rozanne Andersen and Andrew Beato (June 23, 2009), *available at* http://www.ftc.gov/os/statutes/andersonbeatoletter.pdf. Such lengthy delays render the process highly impractical, and cannot be squared with Jerman's characterizations of it as "simple" (Br. 28) and "easy" (Br. 34). More importantly, the Commission has no obligation to issue opinions when requested, and in fact refuses to do so when there is relevant extant case law. *See* Letter to Rozanne Andersen and Andrew Beato (July 28, 2006) (attached as Appendix A) (citing 16 C.F.R. § 1.1(a) (FTC may issue opinions only when "there is no clear Commission or court precedent")). This may explain why Commission opinions regarding the FDCPA are so rare: To NARCA's knowledge, the Commission has issued fewer than *half a dozen* such opinions in the 30-plus years since passage of the Act. In any event, the

FTC's position makes clear that for many collectors, securing an advisory opinion is simply not an option.[11]

II. A TEXTUAL ANALYSIS CONFIRMS THE SIXTH CIRCUIT'S INTERPRETATION OF THE ACT

A. The Plain Text Of § 1692k(c)—Unlike That Of Its Counterpart In The Truth-In-Lending Act—Includes No Exception For Legal Errors

The reasons outlined in Part I for refusing to exclude legal errors from the scope of the FDCPA's bona fide error defense would of course carry little or no weight if the statutory text commanded such exclusion. But that is not the case. To the contrary, the plain language of the Act all but requires that legal errors be *in*cluded. That language simply provides (in relevant part) that a person may not be held liable in a private civil action for a violation that "was not intentional and resulted from a bona fide error." § 1692k(c). There are no additional words that limit the nature of covered "error[s]" to clerical or similar errors, as Jerman would have it. The all-but-conclusive inference to be drawn from that omission is that Congress did not intend to limit application of the defense in the way that Jerman argues. *See, e.g., Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992) ("[A] legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, ... *judicial inquiry is complete.*" (emphasis

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[11] Moreover, the FTC of course cannot resolve questions that do not directly implicate the Act but that can trigger a violation of it, such as which state statute of limitations applies to a particular type of debt.

added) (citations and internal quotation marks omitted)).[12]

That inference is stronger still when the language of § 1692k(c) is compared to that of its counterpart in the Truth-in-Lending Act, Pub. L. No. 90-321, tit. I, 82 Stat. 146 (1968). TILA and the FDCPA are subchapters of a single statute, the Consumer Credit Protection Act. As the court of appeals observed here (echoing similar observations by other circuits), the first subchapter, TILA, includes a bona fide error defense that contains the same language that appears in § 1692k(c). *See* Pet. App. 8a-10a (citing *Johnson* v. *Riddle*, 305 F.3d 1107, 1122-1123 (10th Cir. 2002), and *Jenkins* v. *Heintz*, 124 F.3d 824, 832 n.7 (7th Cir. 1997)). The TILA provision, however, also includes a second clause not found in the FDCPA—a clause specifically defining bona fide errors to exclude most legal errors. *See* 15 U.S.C. § 1640(c) ("[A]n error of legal judgment with respect to a person's obligations under this subchapter is not a bona fide error."). The absence of a similar clause in the FDCPA reinforces the conclusion drawn from the Act's plain language: § 1692k(c) *does* encompass legal errors. Jerman's contrary argument would render TILA's extra clause superfluous, giving the same

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[12] The fact that the Act did not initially cover attorneys does not alter this conclusion, because non-lawyers can also make legal errors, i.e., errors regarding the Act's coverage. Indeed, the Act's legislative history makes clear that Congress *did* consider legal errors in 1977. *See* S. Rep. No. 95-382, at 5 (§ 1692k(c) can provide protection for violating the Act "in any manner, including with regard to the act's coverage"). If anything, the fact that Congress later removed the attorney exemption without saying that legal errors were excluded—as it since had with TILA, *see infra* pages 25-26—only bolsters the conclusion that they are not.

meaning to the two bona fide error provisions notwithstanding the additional defining language in § 1640(c). That position runs afoul of "one of the most basic interpretive canons, that '[a] statute is to be construed so that effect is given to all its provisions.'" *Corley* v. *United States*, 129 S. Ct. 1558, 1566 (2009) (alteration in original) (quoting *Hibbs* v. *Winn*, 542 U.S. 88, 101 (2004)) (internal quotation marks omitted).

Jerman and the government respond to this point with a historical argument. *See* Pet. Br. 7, 12, 22, 41; U.S. Br. 9, 24-25. When the FDCPA was enacted in 1977, they note, TILA's bona fide error provision did not contain the extra clause excluding legal errors. In adopting the FDCPA, Congress thus copied TILA's provision verbatim. And that provision, Jerman and the government assert, had at that time consistently been interpreted to exclude legal errors. Congress should be deemed to have known about this legal consensus, the argument runs, and to have intended the same construction to be applied to the identically worded provision in the FDCPA. This argument fails for several reasons.

First, the premise that there was a settled judicial construction of TILA's bona fide error provision when Congress adopted the FDCPA is wrong. To the contrary, "two different interpretations of § 1640(c) emerged in the 1970s—one view construing it to apply only to mistakes of a clerical or mathematical nature and the other construing § 1640(c) more broadly to encompass good faith efforts at compliance." *Herrera* v. *First N. Sav. & Loan Ass'n*, 805 F.2d 896, 900 (10th Cir. 1986); *accord Ives* v. *W.T. Grant Co.*, 522 F.2d 749, 757 (2d Cir. 1975) ("[TILA's] 'unintentional violation' provision has been the subject of substantial litigation, and two different analyses have emerged."). This stands in

stark contrast to the "settled interpretation" cases that Jerman and the government cite (Pet. Br. 44; U.S. Br. 24-25). In every one of those cases, either this Court itself had previously construed the relevant language or *every* lower court to address the issue had reached the same conclusion. *See Rowe* v. *New Hampshire Motor Transp. Ass'n*, 128 S. Ct. 989, 994 (2008) (prior interpretation by this Court); *Cannon* v. *University of Chi.*, 441 U.S. 677, 696 (1979) (uniform decisions by "a distinguished panel of the ... Fifth Circuit" and "at least a dozen other federal courts"); *Bragdon* v. *Abbott*, 524 U.S. 624, 642, 644 (1998) (prior interpretation adopted by "[e]very agency to consider the issue" and "[e]very court which addressed the issue"); *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978) ("every court to consider the issue").

Nor was the view that TILA's bona fide error provision encompassed legal errors confined to district courts, as the government asserts (Br. 24 n.11). In *Thrift Funds of Baton Rouge, Inc.* v. *Jones*, 274 So. 2d 150 (La. 1973), *cert. denied*, 414 U.S. 820 (1973), which was decided four years before the FDCPA's enactment, the Louisiana Supreme Court squarely so held, stating that "we are unwilling to hold that a bona fide misinterpretation of law ... amounts to an intentional violation of [TILA's] disclosure requirements," *id.* at 161 (citing § 1640(c)). When Congress enacted the FDCPA, therefore, there was no "appellate consensus" (U.S. Br. 24 n.11) that Congress could have intended to adopt. This alone eviscerates Jerman's historical attempt to avoid the plain language of the FDCPA.[13]

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[13] The fact that *Thrift Funds* was decided by a state high court rather than a federal court of appeals is irrelevant to the

Second, the historical argument effectively ignores Congress's 1980 addition to TILA of the clause defining "bona fide error" to exclude legal errors. *See* Truth-in-Lending Simplification and Reform Act of 1980, Pub. L. No. 96-221, tit. V, 94 Stat. 168. That addition demonstrates that in 1980 Congress recognized that the broad, unadorned bona fide error language that appeared in TILA and the FDCPA encompassed legal errors, and it reacted by making clear that in TILA it intended a different meaning. Because it did not similarly amend the FDCPA—and in fact has never done so despite amending the statute in other respects on numerous occasions over the last 32 years—the most plausible conclusion to be drawn is that Congress never intended to exclude legal errors from the scope of § 1692k(c).

Jerman's contrary argument rests partly on the notion (Br. 43) that "the 1980 legislation did not change the operative language of the defense." But that is simply irrelevant. While it is true that "Congress did not change the language describing the elements of the defense" (*id.*), it *did* restrict the scope of one of those elements—and in a way that (as anyone who put the two bona fide error provisions side by side would im-

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analysis, as this Court's cases analogously make clear: The Court often considers state-court decisions in considering whether a conflict among lower courts (i.e., the opposite of an "appellate consensus") warrants the Court's attention. *See Wharton* v. *Bockting*, 549 U.S. 406, 415 (2007) ("The panel's decision ... conflicts with the decision of every other Court of Appeals and State Supreme Court that has addressed this issue. We granted certiorari to resolve this conflict." (footnote omitted)); *Bates* v. *Dow Agrosciences LLC*, 544 U.S. 431, 436-437 (2005) (similar); *Florida* v. *J.L.*, 529 U.S. 266, 269 (2000) (similar).

mediately realize) differentiates that element from its FDCPA counterpart. Jerman's argument, which as noted above would render the second clause of the TILA provision superfluous, *see supra* pages 22-23, is thus that only changes to the actual elements of a statutory defense, and not express congressional restrictions on the scope of one or more elements, should be given effect by this Court. Not surprisingly, she offers no authority (or reasoning) to support that highly counterintuitive claim.

The government, meanwhile, asserts (without citing any authority) that "[a]n amendment to TILA enacted in 1980 does not directly shed light on the intent of the Congress that enacted the FDCPA in 1977." Br. 27. Although the inclusion of the adverb "directly" renders that statement true, this Court has observed that "while the views of subsequent Congresses cannot override the unmistakable intent of the enacting one, such views are entitled to *significant weight*, and particularly so when the precise intent of the enacting Congress is obscure." *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U.S. 572, 596 (1980) (emphasis added) (citing *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974)) (other citation omitted)). And in a more recent case, the Court refused to give weight to subsequent enactments because "[t]hey do not reflect any direct focus by Congress upon the meaning of the earlier enacted provisions." *Almendarez-Torres* v. *United States*, 523 U.S. 224, 237 (1998). Here, of course, the 1980 TILA amendment does reflect such "direct focus by Congress," and specifically reflects a desire to differentiate the scope of TILA's bona fide error defense from that of its FDCPA counterpart.

In short, the plain language of § 1692k(c), particularly in conjunction with its counterpart in TILA, make

unmistakably clear that § 1692k(c) encompasses legal as well as other types of errors.[14]

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[14] Perhaps recognizing this, Jerman argues at length about the requirement in § 1692k(c) that the pertinent violation be unintentional. *See* Pet. Br. 14-25; *see also* U.S. Br. 11-15. But as the government acknowledges (Br. 12 n.7), Congress sometimes uses "intentional" as synonymous with "willful"—a word that both Jerman and the government concede would allow for excusal of legal errors. Nor is the example that the government gives exhaustive. *See, e.g.*, *Kawaauhau* v. *Geiger*, 523 U.S. 57, 61 n.3 (1998) ("The word 'willful' is defined in Black's Law Dictionary as 'voluntary' or 'intentional.' Consistently, legislative reports note that the word 'willful' in [11 U.S.C.] § 523(a)(6) means 'deliberate or intentional.'" (citations omitted)); *see also McLaughlin* v. *Richland Shoe Co.*, 486 U.S. 128, 133 (1988) ("In common usage the word 'willful' is considered synonymous with such words as ... 'intentional.'"). In fact, in at least one instance Congress treated "intentional" as a *higher* form of *mens rea* than "willful." *See Bartnicki* v. *Vopper*, 532 U.S. 514, 547 n.4 (2001) (Rehnquist, C.J., dissenting) ("[T]o ensure that only the most culpable could face liability for disclosure, Congress increased the scienter requirement [in 18 U.S.C. § 2511(1)(c)] from 'willful' to 'intentional.'" (citing S. Rep. No. 99-541, at 6 (1986))).

Using "intentional" as synonymous with "willful" in § 1692k(c) would not be at all "surprising" (Pet. Br. 9), because "[t]he general rule that ... a mistake of law is no defense" is "[b]ased on the notion that the law is definite and knowable," *Cheek* v. *United States*, 498 U.S. 192, 199 (1991). With statutes that are "difficult for the average citizen to know and comprehend," however, "Congress has ... softened the impact of the common-law presumption." *Id.* at 199-200. That is the situation here. Indeed, the contours of the Act's requirements are elusive not just for the "average citizen," *id.* at 199, but even for seasoned attorneys to discern. Under these circumstances, the only "surprising" thing (Pet. Br. 9) would be for Congress to have imposed strict liability *without* "soften[ing] the impact of the common-law presumption," *Cheek*, 498 U.S. at 200.

Finally, the government argues (Br. 14-15) that the reference in § 1692k(c) to an unintentional "violation" actually means the

B. The "Procedures Reasonably Adapted" Requirement Does Not Place Legal Errors Outside The Scope Of § 1692k(c)

Jerman and the government also point to the requirement in § 1692k(c) that an FDCPA defendant asserting a bona fide error defense have maintained "procedures reasonably adapted to prevent" errors. They argue that this language supports their reading of the Act, either because there are no such procedures in the context of legal errors (U.S. Br. 15) or because courts have "struggled to define just what constitutes a procedure reasonably ad[a]pted to avoid misinterpreting the law" (Pet. Br. 26). These arguments are meritless.

To begin with, there is nothing in the definition of "procedure" that precludes its application to legal errors. A procedure is "a particular way of doing or of going about the accomplishment of something," or "a particular course of action." *Webster's Third New Int'l Dictionary* 1807 (1971). That definition is easily satisfied with a series of steps that minimizes the chance of legal error by thoroughly educating an attorney about the relevant law. Such steps would principally include those involved in conducting adequate legal research, i.e., reviewing and analyzing applicable statutes, case law, agency decisions and regulations, and so on.[15] This, in fact, is essentially what courts addressing the

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conduct underlying the violation. This Court, however, has unanimously rejected a similar argument. *See Kawaauhau*, 523 U.S. at 61-62.

[15] Such steps could also include consulting colleagues or other knowledgeable entities and (as the Sixth Circuit found relevant here (*see* Pet. App. 15a-16a)) staying abreast of legal developments by attending conferences and reviewing relevant publications.

issue have held is required in cases like this. *See Ruth* v. *Triumph P'ships*, 577 F.3d 790, 803-804 (7th Cir. 2009) (concluding, after discussing decisions from other circuits, that the bona fide error defense can be maintained for legal errors by "collectors who ... reasonably relied on either: (1) the legal opinion of an attorney who has conducted the appropriate legal research, or (2) the opinion of another person or organization with expertise in the relevant area of law"). There is thus no reason to conclude that the use of the term "procedures" in § 1692k(c) mandates exclusion of legal errors from the bona fide error defense.

In asserting the contrary, the government at times argues as though a procedure qualifies as "reasonably adapted" under the Act only if it eliminates the possibility of errors. *See* U.S. Br. 16 ("[N]o 'procedure' can *definitively avoid* the misapplication or misinterpretation of a comprehensive federal statute." (emphasis added)); *id.* at 8 ("Legal errors cannot be eliminated by ... any step-by-step algorithm."); *id.* at 17 (similar). But that is not what the statute requires—for obvious reasons. Whether an error is legal or some other kind, *no* procedure can entirely eliminate the possibility that the error will ever occur. Indeed, the defense presupposes that some errors will occur despite the use of reasonable procedures. All the Act requires regarding procedures is that they be "reasonably adapted" to prevent the relevant error. In other words, the procedures must be such that, when followed, they render it reasonably unlikely that the error will occur. The procedures discussed above in regard to legal errors easily qualify.

Jerman contends, however (Br. 26), that courts have "struggled" to apply § 1692k(c) to legal errors. Her only support for that assertion is a series of ques-

tions that have arisen in applying the defense to legal errors. That such questions have arisen does nothing to demonstrate that Congress intended to exclude legal errors from the scope of § 1692k(c). Indeed, several of the questions Jerman poses would apply equally to non-legal errors, such as whether the "reasonably adapted" issue is one for the court or the jury and whether the procedures must be adapted to avoid the specific error at issue or merely the category of error (legal, clerical, etc.) in general. This obviously does not mean those non-legal errors should also be excluded. That the nature of legal errors may create more such questions than other types is simply irrelevant to whether Congress meant to include them in the bona fide error defense. If anything, legal errors are particularly *suited* for inclusion in the defense: Judges themselves are of course constantly faced with the challenge of avoiding legal errors in conducting their work. They are thus well situated to evaluate whether a legal error was made in good faith and whether an attorney's procedures were reasonably adapted to avoid it.

Jerman relatedly suggests (Br. 26-27 nn.10, 12, 14) that courts confronting claims of bona fide legal error have reached conflicting conclusions regarding some of these questions. For reasons similar to those just discussed, however, even if such conflicts existed they would not provide a valid basis to conclude that Congress intended to exclude legal errors from § 1692k(c). Courts do not decide the scope of a federal statute based on how many circuits splits one interpretation may lead to in future cases, nor presume more generally that Congress wants courts to steer clear of difficult legal issues whenever possible.

In any event, none of the purported conflicts that Jerman discusses is genuine. Jerman first states (Br.

26 n.10) that the court of appeals here "seemingly" found "that procedures directed at avoiding legal errors generally were sufficient" under the Act, in supposed conflict with the Tenth Circuit's view that procedures must be adapted to avoid the specific error at issue in a case. In fact, the Sixth Circuit took the same position as the Tenth Circuit, rejecting Jerman's argument "that there is a genuine issue of material fact regarding ... whether Defendants maintained procedures reasonably adapted to avoid any legal error *as to the written-dispute requirement*" and "conclud[ing] that Defendants ... maintained procedures reasonably adapted to avoid legal error *relating to the written-dispute requirement.*" Pet. App. 15a (emphases added).[16] Similarly, Jerman suggests a conflict (Br. 27 n.12) over whether a reasonable procedure must include seeking an opinion from the FTC or another expert body. But in both of the cases she cites, the court found *no* such absolute requirement. As for Jerman's third alleged conflict, regarding whether reasonable procedures is a jury question, neither of the cases she cites (Br. 27 n.14) squarely confronted the issue.

Finally, Jerman asserts (Br. 10, 27) that the Sixth Circuit's decision here would lead to federal courts or juries setting professional standards for attorneys. That is incorrect. Interpreting § 1692k(c) to encompass legal errors would mean only that courts or juries would establish standards for avoiding liability under that provision. There is no reason to conclude (cer-

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[16] This is the same approach taken by other circuits in regard to non-legal errors. *See, e.g., Reichert* v. *National Credit Sys., Inc.*, 531 F.3d 1002, 1006 (9th Cir. 2008); *Wilhelm* v. *Credico, Inc.*, 519 F.3d 416, 421 (8th Cir. 2008).

tainly Jerman offers none) that attorneys who did not meet those standards would be subject to any type of professional discipline.[17]

In sum, nothing about the "procedures reasonably adapted" language provides grounds to write a judicial limitation into the plain language of § 1692k(c), which by its terms applies to all types of errors.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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NOVEMBER 2009

[17] Indeed, as explained in Part I, it is Jerman's position that would lead to federal interference with attorneys' obligations under (often state-promulgated) professional standards.

APPENDIX

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

July 28, 2006

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Re: Petition of ACA International for Advisory Opinion

Dear Ms. Andersen and Mr. Beato:

The Federal Trade Commission has received the petition of ACA International ("ACA") for an advisory opinion pursuant to Sections 1.1-1.4 of the Commission's Rules of Practice, 16 C.F.R. §§ 1.1-1.4 ("Rules"). I apologize for the delay in responding to your request. In the petition, you present the following questions:

> Under section 806(6) of the FDCPA, must a debt collector identify a corporate name in order to meaningfully disclose the caller's identity in a telephone call that results in an electronic voice mail message for the debtor? If a corporate name must be disclosed, what specifically must be disclosed when the corporate name implies the collection of a debt, thereby potentially violating the third-party disclosure prohibition of section 805(b)? If the voice mail message is the initial oral communication with the debtor, must the debt collector deliver a "mini-Miranda" disclosure under section 807(11) to notify the debtor that he or she is attempting to collect a debt and that any information obtained will be used for that purpose?

Section 1.1(a) of the Rules provides that the Commission will consider requests for advisory opinions and inform the requesting party of the Commission's views, where practicable, under the following circumstances: "(1) The matter involves a substantial or novel question of fact or law and there is no clear Commission or court precedent; or (2) The subject matter of the request and consequent publication of Commission advice is of significant public interest."

Section 1.1(b) of the Rules further provides that the Commission has authorized the staff to consider all requests for advice, and pursuant to that provision, I have reviewed your request for an advisory opinion.

A number of federal district courts have ruled consistently on the questions you raised in the petition. Based on these decisions, there is clear court precedent for the proposition that a debt collector leaving a voice mail message must reveal the name of his employer, even if the name indicates that the message involves a debt. *Hosseinzadeh v. M.R.S. Associates, Inc.*, 387 F. Supp. 2d 1104 (C.D. Calif. 2005); *Joseph v. J.J. Mac Intyre Cos, L.L.C.*, 281 F. Supp. 2d 1156 (N.D. Calif. 2003); *Wright v. Credu Bureau of Georgia, Inc.*, 548 F. Supp. 591, *on reconsideration on other grounds*, 555 F. Supp. 1005 (N.D. Ga. 1982). Courts also have addressed the issue of whether a debt collector leaving a voice mail message must convey the mini-Miranda disclosure. The decisions are uniform in concluding that a collector failing to do so violates Section 807(11). *Stinson v. Asset Acceptance, LLC*, 2006 U.S. Dist. Lexis 42266 (E.D. Va. June 12, 2006); *Foti v. NCO Financial Systems, Inc.*, 424 F. Supp. 2d 643 (S.D.N.Y. 2006); *Hosseinzadeh*, 387 F. Supp. 2d at 1116. *See also Chlanda v. Wymard*, 1995 U.S. Dist. Lexis 14394, *32 n.16 (S.D. Ohio 1995) (voice mail message requesting that the consumer pay a credit card debt violated Section 807(11) because it did not include that provision's notice).

For the foregoing reasons, your request for an advisory opinion does not satisfy either of the prerequisites prescribed by the Commission Rules of Practice, and accordingly cannot be granted.

Sincerely,

Donald S. Clark

Donald S. Clark
Secretary

AMICUS CURIAE BRIEF

No. 08-1200

Supreme Court, U.S.
FILED
SEP 28 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

KAREN L. JERMAN,

Petitioner,

v.

CARLISLE, McNELLIE, RINI, KRAMER & ULRICH LPA and ADRIENNE S. FOSTER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE STATES OF NEW YORK, COLORADO, CONNECTICUT, FLORIDA, HAWAII, IDAHO, ILLINOIS, IOWA, MARYLAND, MINNESOTA, MISSISSIPPI, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH DAKOTA, OHIO, TEXAS, UTAH, WEST VIRGINIA, AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONER

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BOTH 52E8P7

QUESTION PRESENTED

Whether a debt collector's error in interpreting the law qualifies for the bona fide error defense under the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692.

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INTEREST OF AMICI CURIAE

Amici States have a compelling interest in protecting consumers from unlawful debt-collection practices. Debt-collection abuse is the most frequent consumer complaint made to the state Attorneys General, and the number of complaints is skyrocketing. The FDCPA, enacted in 1977, deters and remedies this sort of abuse by holding debt collectors strictly liable for statutory violations, with only narrow defenses available. Preserving the FDCPA's civil-liability scheme is critical to protecting consumers and to preventing extensive social harm. As Congress recognized in enacting the FDCPA, abusive debt-collection practices contribute to "personal bankruptcies, to marital instability, [and] to the loss of jobs," inflicting irreparable injury not only on individual consumers but on their families and communities as well. 15 U.S.C. § 1692(a).

Proper interpretation of the FDCPA is also vital to the effective enforcement of state consumer-protection laws. Many States have enacted consumer-protection statutes that, like the FDCPA, include a defense for "bona fide error," which has long been understood to mean clerical errors and not errors of law. These state laws include general statutes that prohibit unfair or deceptive practices,[1] as well as specific statutes that address debt collection[2] and other fields.[3] State courts

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[1] *See, e.g.*, Fla. Stat. Ann. § 501.207(4) (Florida Deceptive and Unfair Trade Practices Act); Ga. Code Ann. § 10-1-400 (Georgia Fair Business Practices Act); Iowa Code § 714.H5(7) (West, WESTLAW through 2009 Reg. Sess.) (Iowa Private Right of Action for Consumer Frauds Act); Ind. Code § 24-5-0.5-3(c) (Indiana Deceptive Consumer Sales Act); Ohio (Cont'd)

frequently look to federal FDCPA decisions when

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Rev. Code. Ann. § 1345.11(A) (Ohio Consumer Sales Practices Act); Utah Code Ann. § 13-11-19(4)(c) (Utah Consumer Sales Practices Act); Va. Code Ann. § 59.1-207 (Virginia Consumer Protection Act).

[2] *See* Ark. Code Ann. § 17-24-512(c) (Arkansas Fair Debt Collection Practices Act); Cal. Civ. Code § 1788.30(e) (Rosenthal Fair Debt Collection Practices Act); Colo. Rev. Stat. § 12-14-113(3) (Colorado Fair Debt Collection Practices Act); Conn. Gen. Stat. § 36a-648(c) (Connecticut Creditors' Collection Practices Act); Fla. Stat. Ann. § 559.77(3) (Florida Consumer Collections Practices Act); Me. Rev. Stat. Ann. tit. 32, § 11054(3) (Maine Fair Debt Collection Practices Act); N.H. Rev. Stat. Ann. § 358-C:4(II)(b) (New Hampshire Unfair, Deceptive or Unreasonable Collection Practices Act); 73 Pa. Cons. Stat. § 2270.5(d)(1) (Pennsylvania Fair Credit Extension Uniformity Act); R.I. Gen. Laws § 19-14.9-13 (4)(a) (Rhode Island Fair Debt Collection Practices Act); W. Va. Code § 46A-5-101(8) (West Virginia Consumer Credit and Protection Act); Wis. Stat. Ann. § 425.301(3) (Wisconsin Consumer Act); Wyo. Stat. Ann. § 40-14-522(c) (Wyoming Uniform Consumer Credit Code).

[3] *See, e.g.*, Ariz. Rev. Stat. § 33-1058(B) (bona fide error defense for construction lender who fails to furnish claimant with copy of bonded stop notice within thirty days); Ga. Code Ann. § 44-7-35(c) (bona fide error defense for landlords who improperly retain tenant's security deposit); Ind. Code § 28-9-5-1(b) (bona fide error defense for depository institutions that fail to send required notices when a hold is placed on a depositor's account); Me. Rev. Stat. Ann. tit. 10 § 1149 (bona fide error defense for parties who print more than the last five digits of a credit card or debit card account number or the expiration date of the card on sales receipt); N.J. Stat. Ann. §§ 56:11-7 & 56:11-25 (bona fide error defense for violations of Consumer Credit Transactions Act); N.Y. Gen. Bus. Law § 89-v (bona fide error defense for process servers who fail to comply with record-keeping requirements); N.Y. Real Prop. Law § 265-a (bona fide error defense for violations of Home Equity Theft Protection Act); Tex. Ins. Code Ann. § 2652.004(b) (bona fide error defense for escrow agents who improperly disburse funds from a title

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applying comparable bona fide error defenses under state law. As a result, erroneous interpretation of the federal Act threatens to undermine the effective enforcement of state consumer-protection statutes, which regulate a wide range of consumer-directed activity beyond debt collection alone.

More generally, amici States have an interest in preserving the deterrent effect of the FDCPA, similar state laws, and other statutes that impose civil liability for statutory violations. The principle that "ignorance of the law or a mistake of law is no defense . . . is deeply rooted in the American legal system." *Cheek v. United States*, 498 U.S. 192, 199 (1991). As a result, a mistake-of-law defense should not be recognized in a civil statute like the FDCPA absent unequivocal statutory language expressly granting immunity for mistakes of law.

STATEMENT

The FDCPA imposes strict liability on debt collectors who engage in prohibited practices. Congress provided a limited bona fide error defense, shielding a debt collector from liability if the collector proves that its "violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." 15 U.S.C. § 1692k(c).

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insurance escrow account before funds related to the transaction have been received and deposited in the account); Wis. Stat. Ann. § 812.41(3) (bona fide error defense if garnishee fails to pay funds in required time).

Respondent debt collectors filed a complaint in state court seeking to foreclose on petitioner's house. As mandated by the FDCPA, respondents served petitioner with a debt-validation notice informing petitioner of her legal rights. (Pet. App. 2a-3a). The district court—as have most courts that have addressed the issue—found that respondents' notice violated the FDCPA by requiring consumers to dispute the validity of the claimed debt "in writing," a restriction not authorized by the Act. (Resp. App. 8-11).

Despite this statutory violation, the district court granted respondents' motion for summary judgment. The district court found that respondents' statutory violation was the result of a bona fide error of law, rejecting petitioner's argument that the defense was not available for errors of law. (Pet. App. 30a-34a). The court of appeals affirmed, applying the Act's bona fide error defense to shield respondents' mistake of law. (Pet. App. 5a-18a).

SUMMARY OF ARGUMENT

Petitioner's brief explains how the text and history of the FDCPA's bona fide error defense refute the contention that the defense covers mistakes of law. Instead of repeating those arguments, amici States emphasize here two points of particular concern to them. First, recognizing a mistake-of-law defense would undermine the development of the law under the FDCPA, especially with respect to novel debt-collection practices. Second, absent an explicit statutory provision to the contrary, private parties—unlike public officials—are not entitled to qualified-immunity-like protection against civil liability for mistakes of law.

1. Congress designed two mechanisms to clarify the FDCPA's application to particular facts: private enforcement actions, which result in judicial interpretations of the Act, and advisory opinions from the Federal Trade Commission ("FTC"). Extending the bona fide error defense to mistakes of law would undermine both of these. Consumers would have little incentive to challenge debt-collection practices in any case where the statutory violation was not blatant—precisely the areas where clarification of the law is most needed—because a successful mistake-of-law defense would deny the consumers any recovery. Nor would debt collectors have any incentive to bring questionable practices to the FTC's attention if they could escape liability whenever the law was unsettled. As a result, there would be few opportunities to clarify the law in this area. Public enforcement actions by the FTC and state Attorneys General could not bridge the massive enforcement gap that a mistake-of-law defense would create.

2. Recognizing a mistake-of-law defense under the FDCPA also would depart sharply from the way that other civil regulatory statutes are interpreted. Because they weaken the deterrent value of legal prohibitions, mistake-of-law defenses are rarely recognized—particularly when only civil liability is at stake. For example, although many state consumer-protection statutes, like the FDCPA, include a defense for bona fide errors, amici States are aware of no judicial opinions interpreting a parallel state provision to immunize mistakes of law. Similarly, decisions of this Court apply retroactively in civil cases even if defendants have reasonably relied on contrary lower-court precedent.

Debt collectors are not at all like public officers, who are entitled to qualified immunity when the law is unclear. The policies that animate qualified immunity do not apply to the conduct of private profit-seeking parties. A mistake-of-law defense would remove debt collectors' incentive to be careful in complying with the FDCPA. Because qualified immunity would not be appropriate in this context, this Court should not read a mistake-of-law defense into the FDCPA.

ARGUMENT

I. A Mistake-of-Law Defense Would Undermine the FDCPA's Mechanisms for Clarifying and Enforcing the Act.

The FDCPA bars the FTC (and other federal agencies) from issuing rules or regulations prohibiting specific debt-collection practices. *See* 15 U.S.C. § 1692*l*(d). Instead, it provides two mechanisms for determining the legality of a disputed practice.

First, disputes can be resolved by court rulings. Congress intended private consumer suits to be the primary means for enforcing the Act. S. Rep. No. 95-382, at 5 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1696, 1699 (1977). The FDCPA facilitates private enforcement actions by allowing consumers who successfully challenge unlawful debt-collection practices to recover actual damages, statutory damages, and reasonable attorney's fees. 15 U.S.C. § 1692k(a). Private enforcement suits play a critical role in developing authoritative and binding interpretations of the FDCPA and in establishing prohibited practices under the Act.

Second, the FDCPA allows debt collectors to obtain administrative guidance before engaging in potentially unlawful conduct. Debt collectors can seek advisory opinions from the FTC if their legal obligations are unclear, and the FDCPA incorporates a safe-harbor provision that shields debt collectors from liability if they rely in good faith on the agency's advisory opinions, even if the opinion is later overturned or rescinded. 15 U.S.C. § 1692k(e).

Recognizing a mistake-of-law defense would undermine both of these mechanisms for clarifying and enforcing the FDCPA. Consumers would have little incentive to bring enforcement actions where the law was at all unsettled, because in such circumstances a debt collector could easily claim bona fide error of law and thereby deny the consumer any recovery. And because of the reduced likelihood of recovering an award of attorney's fees, attorneys would be less likely to agree to represent consumers when the debt collector's conduct was legally questionable, but potentially subject to a claim of bona fide error. *See* Nat'l Consumer Law Ctr., *Fair Debt Collection* § 7.2.3, at 413 (6th ed. 2008).

If debt collectors could escape liability for mistakes of law, consumers would be likely to challege only blatant or obvious violations of the FDCPA. In particular, consumers would have little incentive to bring lawsuits contesting new forms of debt-collection abuse. This would undermine the Act's reliance on private enforcement as the principal way to clarify the law in new and untested areas.

Applying the Act's bona fide error defense to legal errors also would undermine the advisory-opinion process. Debt collectors would have no incentive to seek formal guidance from the FTC if they could claim complete immunity based on their own, informal interpretations of the FDCPA's requirements. Nor would they have any incentive to bring questionable practices to the FTC's attention if they could escape liability whenever the law was unsettled.

The result would be to ossify the FDCPA. Debt collectors would claim immunity when there was no court decision or advisory opinion specifically prohibiting a particular debt-collection practice, or if there was a split among the courts about a particular question. But if mistake of law were a defense, nobody would have an adequate incentive to seek judicial or administrative opinions clarifying how the FDCPA applies to new or disputed debt-collection practices.

This is not merely a hypothetical problem. The debt-collection industry has radically expanded and transformed since the FDCPA was enacted. Debt collectors continually push the envelope, testing the boundaries of the Act and developing new strategies and tactics for collecting debts. There are many practices whose legality is currently disputed or unsettled, such as attempts to collect time-barred consumer debt and the use of pre-recorded messages and other new communications technologies to contact consumers.[4]

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[4] *See, e.g.*, Nat'l Consumer Law Ctr. & Nat'l Ass'n of Consumer Advocates, *Comments to the Federal Trade Commission Regarding the Fair Debt Collection Practices Act—Collecting Consumer Debts: The* (Cont'd)

If debt collectors could rely on the absence of applicable precedent or the presence of a few conflicting decisions to assert a mistake-of-law defense, it would freeze the law in place, preventing application of the FDCPA to evolving practices, new technologies, and changing circumstances.

Here, for example, the court of appeals credited respondents' claim of bona fide legal error because of a split among the courts regarding use of the disputed in-writing requirement. The Third Circuit upheld use of an in-writing restriction in 1991, but the Ninth Circuit like most district courts to address the issue reached the opposite conclusion in 2005. (Pet. App. 36a-37a). It is quite possible that the Third Circuit was wrong in 1991. But the plaintiffs who prevailed in later cases would not have brought those suits if debt collectors could bar recovery by claiming mistakes of law. As a result, debt collectors could continue to engage in illegal debt-collection practices, shielded by a mistake-of-law defense that undermines the very mechanisms that Congress intended for continuing clarification and application of the FDCPA.

The resulting enforcement gap would be extensive. It is unclear whether the bona fide error defense applies

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Challenges of Change at 13-14, 31-32 (June 6, 2007), *available at* http://www.ftc.gov/os/comments/debtcollectionworkshop/529233-00018.pdf (collection of time-barred debt); John P. Holahan, *Emerging Issues in Debt Collection Law*, 62 Consumer Fin. L.Q. Rep. 267, 270 (Fall-Winter 2008) (pre-recorded messages and new communications technologies).

in FTC enforcement actions,[5] but even if it does not, FTC enforcement is no substitute for private consumer suits. The FTC has recently reaffirmed that "[p]rivate actions, not FTC actions, were intended to be and should be the main means for promoting industry compliance with the FDCPA" and that the threat of liability is the main deterrent of unlawful conduct. Fed. Trade Comm'n, *Collecting Consumer Debts: The Challenges of Change: A Workshop Report* ii (Feb. 2009), *available at* http://www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf. The FTC lacks the resources to be the exclusive or even the primary enforcer of the FDCPA. The FTC currently receives more than 70,000 complaints annually about third-party debt collectors, yet it has brought only sixty FDCPA enforcement suits during the past thirty years. *Id.* at 67. As the agency has acknowledged, it is simply "not feasible" to rely on government enforcement alone. *Id.*

The same is true for enforcement on the state level. The state Attorneys General and other state agencies play a critical role in protecting consumers. But States would have to divert critical—and limited—resources from other consumer-protection efforts if private enforcement of the FDCPA ceased to be the effective tool that Congress intended.

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[5] The FDCPA lists bona fide error as a defense to civil liability in a consumer enforcement action. 15 U.S.C. § 1692k(c). The Act contains a separate provision outlining the FTC's administrative enforcement powers, *id.* § 1692*l*, suggesting that the defense may not be available in an FTC enforcement suit seeking injunctive relief, restitution, or disgorgement.

II. Allowing a Qualified-Immunity-Like Defense Here Would Be Inconsistent with the Way Other Statutes Are Interpreted.

Because immunity for legal errors undermines the deterrent value of the law, failure to know the law is rarely recognized as a defense even when criminal liability is at stake. *See, e.g.*, *Cheek*, 498 U.S. at 199; *Utermehle v. Norment*, 197 U.S. 40, 55 (1905). A mistake-of-law defense is virtually unknown in the civil regulatory context. There are dozens of civil regulatory statutes that, like the FDCPA, contain defenses for bona fide errors. *See, e.g.*, *supra* 1-3, nn. 1-3. But except when the statute expressly provides to the contrary,[6] those defenses do not cover mistakes of law. Amici States are aware of no decisions interpreting a parallel state bona fide error provision to immunize a defendant's mistake of law. In the few instances where defendants have even raised that claim, it has been rejected as directly contrary to the goal of ensuring statutory compliance. *See LaPetina v. Metro Ford Truck Sales, Inc.*, 648 F.2d 283, 286-88 (5th Cir. Unit A June 1981); *First Wis. Nat'l Bank v. Nicolaou*, 113 Wis. 2d 524, 532-35, 335 N.W.2d 390, 393-95 (1983). Even defendants who reasonably rely on judicial decisions assume the risk that those decisions will be overturned and a different rule applied to their conduct. *See Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 759 (1995); *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993).

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[6] *See, e.g.*, Kan. Stat. Ann. § 16a-5-201(7) (provision of the Kansas Consumer Credit Code providing a defense for a "bona fide error of law or fact"); Ind. Code § 24-9-5-5 (same in the Indiana Home Loan Practices Act).

The only area of law where civil defendants have the type of immunity that respondents claim is the qualified-immunity doctrine shielding government officers from damages liability when their "conduct does not violate clearly established statutory or constitutional rights." *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009) (quotation marks omitted). But the reasons for providing qualified immunity to government officers "are not transferable to private parties." *Wyatt v. Cole*, 504 U.S. 158, 168 (1992).[7]

Public officers are shielded from liability when acting in uncertain or unclear legal territory because denying immunity would result in "unwarranted timidity" in the administration of public programs and the pursuit of legislative goals. *Richardson v. McKnight*, 521 U.S. 399, 408 (1997). The duties of government officers make timidity especially undesirable: government officers confront situations that demand "principled and fearless decision-making." *Id.* at 408 (quotation marks omitted). An officer's failure to act or delay in taking action may result in dereliction of the officer's public duty, harming the public good. When government action is at stake, erring "on the side of caution" is not always desirable. *Davis v. Scherer*, 468 U.S. 183, 196 (1984) (citing police officers and prison wardens as examples); *see also Scheuer v. Rhodes*, 416 U.S. 232, 246 (1974) ("[O]fficials

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[7] Qualified immunity is also narrower than the mistake-of-law defense upheld by the courts below. Immunity rests on the "*objective* reasonableness of an official's conduct as measured by reference to clearly established law;" a claim of *subjective* ignorance of what the law requires is not enough to shield a public officer from damages liability. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (emphasis added).

. . . must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office.").

And at the same time the incentives of government officers tend to promote timidity in the absence of qualified immunity: because officers are not rewarded financially for taking bold action when it is needed, the threat of monetary liability will tend to make them too timid in the face of legal uncertainty.

There is no comparable concern when private commercial activity is at issue. Debt collectors, for example, have a direct financial incentive to engage in aggressive debt-collection practices that may result in higher rates of collection. Because of these potential rewards, the threat of liability will not result in "unwarranted timidity," *Richardson*, 521 U.S. at 408, by debt collectors. Quite the opposite: Congress enacted the FDCPA because debt collectors—when allowed to act without fear of liability—engaged in widespread abuse, resulting in extensive consumer harm. S. Rep. No. 95-382, at 2, 1997 U.S.C.C.A.N. at 1696-97. A mistake-of-law defense would cause debt collectors to regress to that era by eliminating their incentive to be careful in complying with the FDCPA. *Cf. Carlson v. Green*, 446 U.S. 14, 21 (1980) (recognizing that the threat of civil liability deters unlawful conduct).

Moreover, the burdens of complying with the FDCPA are not comparable to the burdens faced by public officers entitled to qualified immunity. Public officers must comply with a wide range of fact-specific and potentially conflicting constitutional and statutory

requirements. *See Davis*, 468 U.S. at 196. Debt collectors, by contrast, are responsible for a much narrower body of statutory law. Parties who operate in highly regulated fields—like consumer debt collection—have fair notice that their conduct may be subject to statutory restrictions. *Cf. Boyce Motor Lines v. United States*, 342 U.S. 337, 340-42 (1952). When routine economic legislation is at issue, defendants are ordinarily expected "to consult relevant legislation in advance of action" and to clarify the meaning of a statute, if ambiguous, "by [their] own inquiry, or by resort to an administrative process." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982).

Here, for example, debt collectors can seek advisory opinions from the FTC, a protective option generally not available to government officers. Because the federal courts lack "the power to render advisory opinions," *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975), government officers have no means to seek binding advisory rulings on unsettled questions of law. Debt collectors, by contrast, deliberately "take the risk of being wrong" when they do not ask for an FTC advisory opinion, "the mechanism[] provided by Congress" for testing the legality of disputed conduct. *Cheek*, 498 U.S. at 206. As between a defendant debt collector who consciously incurs the risk of statutory violation—by "go[ing] perilously close to an area of proscribed conduct"—and an injured consumer, who has no choice in the matter, the risk of illegality is better placed on the debt collector. *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 393 (1965); *Russell v. Equifax A.R.S.*, 74 F.3d 30, 35 (2d Cir. 1996).

Other than qualified immunity, a doctrine unique to government activity and more limited than the mistake-of-law defense recognized here, see *supra* 12 n.7 & Pet. Br. at 16, there is no comparable common-law tradition of immunizing mistakes of law. Neither respondents nor the courts below identified any comparable federal statute where Congress shielded a private party's mistake of law. The defense is so rare because it directly undermines the purpose of imposing civil liability to deter unlawful conduct. Legislative silence cannot support an inference that Congress intended to depart from such a well-established norm, when such a departure would undermine the core purpose of the Act. *See United States v. Texas*, 507 U.S. 529, 534 (1993).

CONCLUSION

The judgment of the court of appeals should be reversed.

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AMICUS CURIAE BRIEF

No. 08-1200

In the Supreme Court of the United States

KAREN L. JERMAN,
Petitioner,
v.
CARLISLE, MCNELLIE, RINI, KRAMER & ULRICH, L.P.A. AND ADRIENNE S. FOSTER,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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INTERESTS OF AMICI CURIAE[1]

The Ohio Creditor's Attorney Association (OCAA) and the California Creditor's Bar Association (CCBA) represent the shared interests of their member attorneys and law firms whose primary practice is the collection of consumer debt in Ohio and California, respectively. The OCAA and the CCBA educate members and others on the laws that impact legal practices involving the protection and assertion of creditors' rights. Both groups actively encourage compliance with legislation regulating retail collections, including the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 *et seq.* (FDCPA). OCAA and CCBA members engage in consumer debt collection, and their conduct is often subject to challenge in lawsuits under the FDCPA.

Amici curiae OCAA and CCBA urge the Court to affirm the Sixth Circuit's decision and find that the bona fide error (BFE) defense set forth in 15 U.S.C. § 1692k(c) applies to legal errors.

ARGUMENT

A. The FDCPA Bona Fide Error Defense Applies to Legal Errors.

Petitioner and her supporting amici base their arguments on the unsupportable fiction that when enacting the FDCPA, Congress adopted the Truth in Lending Act's (TILA's) BFE defense in total.

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[1] Pursuant to Rule 37.6, *amici curiae* certify that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amicus or its counsel made a monetary contribution to its preparation or submission. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

Petitioner also argues Congress adopted a phantom proviso not appearing in the text of the FDCPA, due to judicial interpretations of the pre-amendment version of TILA's BFE defense. There are seven reasons why they are clearly wrong.

1. **The Absence of a Proviso Excluding an "Error of Legal Judgment" from the FDCPA's Bona Fide Error Defense Precludes the Inference That a Proviso Was Intended.**

Congress knows how and why to draft a proviso. "[T]he office of a proviso, generally, is either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the legislature to be brought within its purview." *Thaw v. Falls,* 136 U.S. 519, 542 (1890) (quoting *Minis v. U. S.*, 40 U.S. 423, 445 (1841)). The plain language of the FDCPA's BFE defense contains no proviso excluding an "error of legal judgment" from its scope, while TILA's BFE defense does. *Compare* 15 U.S.C. § 1692k(c) *with* 15 U.S.C. § 1640(c).

When Congress intends to limit the BFE defense to exclude legal errors, it does so expressly. *Compare* 12 U.S.C. § 2607(d)(3) (1974) (no proviso) (Pub. L. 93-533, § 8, 88 Stat. 1727 (1974)); 12 U.S.C. § 4010(c)(1) (1987) (proviso); 15 U.S.C. § 1640(c) (1980) (proviso, as amended) (Pub. L. 96-221, 94 Stat. 164 (1980)); 15 U.S.C. § 1692k(c) (1977) (no proviso); 15 U.S.C. § 1693h(c) (1978) (no proviso); 15 U.S.C. § 1693m(c) (1978) (no proviso); *see also Standard Oil Co. v. Federal Energy Administration,* 440 F.Supp. 328, 368, nn. 7, 100 (N.D. Ohio 1977) (quoting

Economic Stabilization Act of 1970, 12 U.S.C. § 1904, note § 210(b) (no proviso)).

Because no proviso appears in 15 U.S.C. § 1692k(c), a "legal error" proviso cannot be implied. *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) (*expressio unius est exclusio alterius*); *accord Smith v. City of Jackson, Miss.*, 544 U.S. 228, 233 (2005) (*in pari materia*); *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (rule against superfluities).

2. Petitioner's Argument Ignores Dozens of State Consumer Protection Laws That Adhere to the "Error in Legal Judgment" Proviso Dichotomy.

The Petitioner's argument ignores scores of state consumer protection statutes which have BFE defenses that include an "error in legal judgment" proviso. Uniform laws drafted before and after the FDCPA provide a BFE defense with and without a legal error proviso. *Compare* ULA, Uniform Consumer Sales Practices Act § 9(b)(3),[2] § 11(d)(2)[3] (1970) (without proviso) *with* ULA, Uniform Consumer Leases Act § 504(b)[4] (2002) (with proviso);

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[2] "If a supplier shows by a preponderance of the evidence that a violation of this Act resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error ... ."

[3] "If a supplier shows by a preponderance of the evidence that a violation of this Act resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error ... ."

[4] "A holder is not liable for statutory damages under Section 501(d) if the holder proves by a preponderance of the evidence that the violation was unintentional and resulted from an error in good faith notwithstanding the maintenance of procedures reasonably adapted to avoid the error. For purposes of this subsection, errors in good faith include clerical errors,

ULA, Uniform Debt-Management Services Act § 35(f)[5] (2005) (with proviso). At present, there are 134 state consumer protection and debt collection statutes that provide a BFE defense deriving from these model acts and various federal statutes:[6] of these, 92 contain no legal error proviso,[7] while 42 expressly exclude legal errors from their scope.[8]

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calculation errors, computer malfunctions and programming errors, but an error of legal judgment with respect to a holder's obligations under this [Act] is not a good faith error."

[5] "A provider is not liable under this section for a violation of this [act] if the provider proves that the violation was not intentional and resulted from a good-faith error notwithstanding the maintenance of procedures reasonably adapted to avoid the error. An error of legal judgment with respect to a provider's obligations under this [act] is not a good-faith error."

[6] These statutes all use the phrase - "bona fide error notwithstanding the maintenance of procedures ...."

[7] Ark. Code Ann. § 17-24-512(c) (Michie 2009); Cal. Bus. & Prof. Code § 10248.2(b) (West 2008); Cal. Civ. Code § 2924e(d) (West 1993); Cal. Civ. Code § 2924i(f)(2) (West 1993); Cal. Civ. Code § 2965 (West 1993); Cal. Civ. Code § 2988.5(d) (West 1993); Cal. Fin. Code § 22751(b) (West 1999); Cal. Fin. Code § 22752(b) (West 1999); Cal. Fin. Code § 23061(b) (West 2009); Cal. Fin. Code § 23062(b) (West 2009); Colo. Rev. Stat. § 5-5-201(6) (2002); Colo. Rev. Stat. § 5-5-202(3) (2002); Colo. Rev. Stat. § 12-14-113(3) (2009); Conn. Gen. Stat. § 36a-648(c) (2008); Fla. Stat. Ann. § 501.207(4) (West 2006); Fla. Stat. Ann. § 559.77 (West 2001); Ga. Code Ann. § 10-1-400 (2009); Haw. Rev. Stat. § 476-21(1984); Idaho Code § 28-45-201(7) (2009); Idaho Code § 63-4011(3) (2009); Ind. Code § 24-4.5-5-203(b)(3) (2006); Ind. Code § 24-5-0.5-3(c) (2006); Ind. Code § 28-9-5-1(b) (1996); Iowa Code § 535B.11(5) (1997); Iowa Code § 537.5201(7) (1997); Iowa Code § 537.5203(3) (1997); Iowa Code § 714H.5(7) (2009); Kan. Stat. Ann. § 16a-5-201(7) (2008); Kan. Stat. Ann. § 16a-5-203(3) (2008); Me. Rev. Stat. Ann. tit. 9-A, § 5-201(8) (West 2009); Me. Rev. Stat. Ann. tit. 9-A, § 6-108(7) (West 2009); Me. Rev. Stat. Ann. tit. 9-A, § 6-113(2) (West 2009); Me. Rev. Stat. Ann. tit. 9-A, § 9-405(7) (West 2009); Me. Rev. Stat. Ann. tit. 10, § 1328(5)

(West 2009); Me. Rev. Stat. Ann. tit. 10, § 1477(2)-(3) (West 2009); Me. Rev. Stat. Ann. tit. 10, § 1490(2) (West 2009); Me. Rev. Stat. Ann. tit. 32, § 11054(3) (West 1998); Me. Rev. Stat. Ann. tit. 33, § 526(2) (West 1999); Md. Code Ann., Com. Law § 12-707(f) (1989); Md. Code Ann., Com. Law § 12-1110(c)(1) (1989); Md. Code Ann., Com. Law § 14-1213 (2006); Mass. Gen. Laws ch. 167B, § 19(c) (2003); Mass. Gen. Laws ch. 167B, § 20(c) (2003) (amended 2008); Mich. Comp. Laws § 14.320(4) (2004); Mich. Comp. Laws § 14.321(6) (2004); Mich. Comp. Laws § 445.910(4) (2002); Mich. Comp. Laws § 445.911(6) (2002); Mich. Comp. Laws § 445.963(4) (2002); Mich. Comp. Laws § 445.964(6) (2002); Mich. Comp. Laws § 550.1211a(10) (2002); Mich. Comp. Laws § 550.1402(11) (2002); Minn. Stat. § 13B.06(d) (2005); Minn. Stat. § 47.59(14)(f) (2009); Mo. Rev. Stat. § 407.100(6) (2001); Mo. Rev. Stat. § 407.1076(1) (2001); Neb. Rev. Stat. § 45-1024(4) (2000); Neb. Rev. Stat. § 45-1039 (2001); Neb. Rev. Stat. § 45-1025(3) (1998); Neb. Rev. Stat. § 45-1058 (2001); Nev. Rev. Stat. § 100.115(3) (2007); N.H. Rev. Stat. Ann. § 361-D:22 (1996); N.Y. Gen. Bus. Law § 396-u(7) (McKinney 1996); N.Y. Real Prop. Law § 265-a(10)(b) (McKinney 2006); N.C. Gen. Stat. § 24-11.1 (1987); N.C. Gen. Stat. § 24-11.2 (1987); Ohio Rev. Code Ann. § 1334.10(D) (Banks-Baldwin 1979); Ohio Rev. Code Ann. § 1345.11(A) (Banks-Baldwin 1978); Okla. Stat. 14A, § 5-202(8) (1969)(amended 2004); Or. Rev. Stat. § 646A.244(2)(a) (2003); 73 Pa. Cons. Stat. § 2270.5(d) (2000); R.I. Gen. Laws § 19-14.9-13(4)(a) (2007); S.C. Code Ann. § 37-5-202(7) (Law Co-op. 1999); S.C. Code Ann. § 37-5-203(3) (Law Co-op. 1996) (amended 2003); S.C. Code Ann. § 37-10-105 (Law Co-op. 1997); S.C. Code Ann. § 40-58-78 (Law Co-op. 2003) (amended 2005); Tex. Fin. Code Ann. § 349.101(a)(1)(B) (West 2006); Utah Code Ann. § 7-17-8(3) (1979); Utah Code Ann. § 13-11-17(2)(d) (2004); Utah Code Ann. § 13-11-19(4)(c) (1995); Vt. Stat. Ann. tit. 9, § 206(b) (2001); Va. Code Ann. § 56-231.34:2(C) (Michie 1999); Va. Code Ann. § 56-231.50:2(C) (Michie 1999); Va. Code Ann. § 56-235.8(G)(7) (Michie 1999); Va. Code Ann. § 56-593(F) (Michie 2000); Va. Code Ann. § 59.1-207 (Michie 1995) (amended 2008); Wis. Stat. § 425.301(3) (2005); Wis. Stat. § 428.106(3) (1973)(amended 2003); Wis. Stat. § 766.56(4)(c) (2009); Wis. Stat. § 812.41(3) (2007); Wyo. Stat. Ann. § 40-14-522 (Michie 1988); *see also* V.I. Code Ann. tit. 12A, § 108(e) (1973).

[8] Ariz. Rev. Stat. § 44-6812(C) (1996); Ark. Code Ann. § 23-53-106(e)(2)(B) (Michie 2003); Cal. Civ. Code § 1812.637(a) (West

The distinction drawn by state legislatures across the country between statutory BFE provisions which expressly reference an error in legal judgment limitation, and those that do not, would be lost if they were all interpreted to mean the same thing. These differences in express statutory language cannot be ignored without concluding the distinction is attributable to widespread legislative inadvertence, assumption or error, rendering the express "error in legal judgment" proviso language superfluous. This

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2009); Cal. Fin. Code § 866.4 (West 1999); Cal. Health & Safety Code § 18036.5(e) (West 2006); Cal. Ins. Code § 12413.1(i) (West 2005); Conn. Gen. Stat. § 36a-683(c) (2004); Conn. Gen. Stat. § 36a-760i(a)(2) (2008); Fla. Stat. Ann. § 494.00796(2) (West 2009); Fla. Stat. Ann. § 559.730 (West 2009); Ga. Code Ann. § 7-6A-9(2) (2009); Haw. Rev. Stat. § 449-4 (1967) (amended 1992); Haw. Rev. Stat. § 480D-4 (1987); 815 Ill. Comp. Stat. 636/75(2) (West 1997); Ky. Rev. Stat. Ann. § 360.100(4)(b) (Banks-Baldwin 2008); Me. Rev. Stat. Ann. tit. 9-A, § 8-206-E(7)(B) (West 2009); Me. Rev. Stat. Ann. tit. 9-A, § 8-208(3) (West 2009); Mass. Gen. Laws ch. 93, § 93(c) (2006); Mass. Gen. Laws ch. 140D, § 32(c) (2002); Mich. Comp. Laws § 445.871a (2002); Mich. Comp. Laws § 445.1641(1) (2002); Mich. Comp. Laws § 445.1862(1) (2002); Mich. Comp. Laws § 484.2506(3) (1998); Mich. Comp. Laws § 484.3314(2) (1998); Mich. Comp. Laws § 491.1119(14) (2005); Miss. Code Ann. § 75-24-173(1) (1995); Nev. Rev. Stat.§ 604A.930(4) (2007); N.H. Rev. Stat. Ann. § 358-P:12(I) (1994); N.J. Stat. Ann. 46:10B-29(c)(2) (West 2009); N.M. Stat. Ann. § 57-26-12 (Michie 1995); N.Y. Banking Law § 6-l(b) (McKinney 2008); N.Y. Gen. Bus. Law § 89-v (McKinney 2004); N.Y. Gen. Bus. Law § 89-hh (McKinney 2004); N.Y. Pers. Prop. Law § 346 (McKinney 2009); N.C. Gen. Stat. § 24-1.1E(e)(2) (1999) (amended 2009); N.C. Gen. Stat. § 24-1.1F (2008) (amended 2009); Ohio Rev. Code Ann. § 1349.30(B) (Banks-Baldwin 2009); Okla. Stat. tit. 14A, § 5-203(3) (1996); Okla. Stat. tit. 59, § 1955(F) (2000); R.I. Gen. Laws § 6-44-9(b) (1989); S.C. Code Ann. § 37-23-85 (Law Co-op. 1976) (amended 2003); Tenn. Code Ann. § 45-20-108(a)(2), (b) (2006).

conclusion flies in the face of the rule against superfluities. *Hibbs v. Winn*, supra.

3. The Legislative History of the FDCPA Demonstrates That Congress Borrowed from Existing State Laws Governing Debt Collection, Not from the TILA.

The FDCPA's legislative history provides evidence that Congress borrowed from existing state law, not from the TILA, when it drafted the FDCPA. *See Debt Collection Practices Act of 1976, Hearings on H.R. 11969 Before the House Comm. on Banking, Currency & Housing*, 94th Cong. (March & April 1976) (hereinafter "*Hearings on H.R. 11969*") pp. 144-55, 183-84 (Statement of John W. Johnson, Model Legislation Exhibits B & C); pp. 230-34 (Statement of Jay I. Ashman); pp. 237-41 (Statement of Joel Weisberg); pp. 252-56 (Statement of Richard Gross); pp. 264-65 (Statement of Thomas Raleigh);[9] pp. 274-75 (Statement of Lewis Goldfarb); *see also* H.R. 10191, 94th Cong. (1975); H.R. 11969, 94th Cong. (1976); H.R. 13720, 94th Cong. (1976); *Senate Comm. on Banking, Housing & Urban Affairs*, Markup on Debt Collection Legislation 61 (June 30, 1977) (Mr. Taffer (referring to the general prohibitions in Sections 806, 807): "It is lifted from the West Virginia debt collection law. It is also similar in concept to 14 other state laws which set forth general prohibitions like this.");[10] p. 64 (Senator Riegle: "[A]s was pointed out by counsel, this is patterned after what are thought to be some of the best state laws where

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[9] Stating there were 10 states with laws that had "value to the consumer," identifying Illinois and Texas, expressly.

[10] *See* W.Va. Code Ann. §§ 46A-2-123 to 46A-2-128 (Michie 1974).

states have moved in to deal with these problems. There are fourteen states who now have these general prohibitions. One of them is the state of New Mexico. One is my-own home state of Michigan. This is not a new invention."); William Richard Carroll, *Debt Collection Practices: The Need for Comprehensive Legislation*, 15 Duq. L. Rev. 97, 116 (1976).[11]

Legislation to address extrajudicial debt collection first appeared in state law and federal regulations in the late 1960s and early 1970s.[12] John M. Connolly, *Recent Statutes Regulating Debt Collection, or Nunc, De Minimis Curat Lex*, 14 B.C. Indus. & Com. L. Rev. 1274, 1280-89 (1972-1973) (hereinafter "*Recent Statutes*"); *see also* 16 C.F.R. §§ 237.0-237.6 (1968);[13] *see generally* FTC, *Guide*

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[11] Discussing precursors to H.R. 5294, 95th Cong. (1977) (citing H.R. 10191, 94th Cong. (1975); H.R. 13720, 94th Cong. (1976)).

[12] At common law, wrongful extrajudicial debt collection abuses were actionable under a variety of tort theories. William F. Julavits & Clinton A. Stuntebeck, *Effectively Regulating Extrajudicial Collection of Debts*, 20 Me. L. Rev. 261, 264-73 (1968); Charles E. Hurt, *Debt Collection Torts*, 67 W. Va. L. Rev. 201 (1965); Comment, *Collection Capers: Liability for Debt Collection Practices*, 24 U. Chi. L. Rev. 572, 579-87 (1956).

[13] The FTC's Debt Collection Deception Guides were promulgated under 15 U.S.C. § 45; the Guides were repealed in 1995 as superseded by the FDCPA. 60 Fed. Reg. 40263-01 (1995); *see Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168, 1173 (11th Cir. 1985) (citing *State v. O'Neill Investigations, Inc.*, 609 P.2d 520, 529 n. 29 (Alaska 1980) (citing numerous cases brought by the FTC under the Debt Collection Deception Guides)); *see also, e.g., In the Matter of State Credit Control Bureau, Inc.*, 68 F.T.C. 560 (1965) (outlining a defense to Debt Collection Deception Guides). The FTC viewed the proposed legislation as codifying its prior orders against debt collectors issued under Section 5 of the FTC Act. *Hearings on H.R. 11969*, p. 274.

Against Debt Collection Deception, 71 Com. L.J. 17 (1966). By the time Congress took up consideration of debt collection legislation in the mid 1970s, state debt collection practices statutes were available to and evaluated by Congress. *See* H.R. Rep. No. 95-131, at 2-3 (1977); S. Rep. No. 95-382, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696-97 (1977); *see generally Hearings on H.R. 11969.*[14] Early state laws addressing extrajudicial collection were modeled after the National Consumer Act, the Model Consumer Credit Act, and the Model Consumer Debt Collection Fair Practices Act. *Recent Statutes, supra*, at nn. 50-65 (citing Fla. Stat. Ann. §§ 559.55-.78 (West Supp. 1972);[15] Md. Ann. Code art. 83, § 167 (Supp. 1972); Mass. Gen. Laws Ann. ch. 93, §§ 24-28, 49; ch. 93A §§ 9-10 (1972); Wash. Rev. Code §§ 19.16.100-.950, 19.86.090 (1972); Wis. Stat. §§ 427.101-.105, 425.304 (Spec. Pamphlet 1973));[16]

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[14] The state statutes were criticized because they varied in scope and available remedies, and they could not be enforced across state lines. *Hearings on H.R. 11969*, pp. 264-65; Carroll, 15 Duq. L. Rev. at 99-108; Seth D. Shenfield, *Debt Collection Practices: Remedies for Abuse*, 10 B.C. Indus. & Com. L. Rev. 698, 698-700 (1968-69); *Abusive Debt Collection, supra*, 15 Wm. & Mary L. Rev. at 567-78. The objective of these statutes was to identify and ban collection activities that were viewed as unreasonable, impermissible and intolerable at common law, and to thereby codify existing tort law. Carroll, *supra*, 15 Duq. L. Rev. at 114-19; *Abusive Debt Collection, supra*, 15 Wm. & Mary L. Rev. at 581-90.

[15] *See* § 559.77(3) "A person shall not be held liable in any action brought under this section if the person shows by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error, notwithstanding the maintenance of procedures reasonably adapted to avoid any such error."

[16] *See* § 425.301(3): "Notwithstanding any other section of chs. 421 to 427, a customer shall not be entitled to recover specific

David F. Maxwell, *Model Consumer Debt Collection Fair Practices Act*, 80 Com. L.J. 184, 184-87 (1975);[17] Robert E. Scott & Diane M. Strickland, *Abusive Debt Collection: A Model Statute for Virginia*, 15 Wm. & Mary L. Rev. 567, 575-77, 594-600 (1973-1974) (hereinafter "*Abusive Debt Collection*"); National Conference of Lawyers & Collection Agencies, *A Model Act to License & Regulate Collection Agencies*, 70 Com. L. J. 38, 38-40 (1965).[18]

Among the state debt collection practices laws in effect prior to adoption of the FDCPA, several included a BFE defense in terms substantively identical to that adopted by Congress when it enacted the FDCPA. *See supra notes* 15-18; *see e.g.* Fla. Stat. Ann. § 559.77(3) (West Supp. 1972) (quoted *supra* n. 15); *Fair Debt Collection Practices Act: Hearings on S. 656, S. 918, S. 1130, & H.R. 5294 Before the Subcomm. on Consumer Affairs of the Comm. on Banking, Housing & Urban Affairs*, 95th Cong. (May 12-13, 1977) (hereinafter "*Senate*

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penalties ... if the person violating chs. 421 to 427 shows by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error."

[17] Section 3 of the Model Act provided: "No person shall be guilty of a violation of this Act if the action complained of resulted from a bona fide error notwithstanding the use of reasonable procedures adopted to avoid such error." Maxwell, *supra*, 80 Com. L.J. at 187.

[18] *See also Central Adjustment Bureau, Inc. v. Gonzales*, 528 S.W.2d 314, 316 (Tex. Civ. App. 1975) (quoting Tex. Rev. Civ. Stat. Ann. art. 5069-11.08 (Supp. 1975) (repealed 1997): "No person shall be guilty of a violation of this Act if the action complained of resulted from a bona fide error notwithstanding the use of reasonable procedures adopted to avoid such error.").

Hearings") (Statement of John B. Conlan, pp. 187-94, 194) (discussing Florida collection law).[19]

There is simply no support in the legislative history that Congress modeled the FDCPA's BFE defense on TILA's BFE defense.

4. Senate Report No. 95-382 Demonstrates That Congress Rejected the TILA Analogy.

The statement appearing in the Senate Report that the BFE defense was to apply to when a debt collector "violates the act in any manner, including with regard to the act's coverage" must be understood in context. S. Rep. No. 95-382, *supra*, at 1, 5. Each of the bills under consideration by Congress contained a substantially similar BFE defense. *Compare Senate Hearings*, *supra*, pp. 625-710 (reprinting S. 656 § 813(c), S. 918 § 813(c), S. 1130 §805(e), & H.R. 5294 § 812(c), all from 95th Cong. (1977)). The three bills

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[19] Legislation containing a BFE defense first appeared in state usury, consumer lending and credit statutes in the 1940s. *See* Barbara A. Curran, *Trends in Consumer Credit Legislation*, 16, 34, 153 (Univ. of Chicago Press 1965) (hereinafter "*Trends*") (quoting Uniform Small Loan Law §13(c), (7th Draft, 1942); *ibid.* at Charts 1, 5, 140-43 & 172-93 (listing state small loan laws adopting U.S.L.L. §13(c)); *ibid.* at 118 & Chart 27, 361-78 (retail installment sales). Section 13(c) of the Uniform Small Loan Law provided in pertinent part, "[i]f any amount in excess of the charges permitted by this Act is charged, ... except as the result of a bona fide error of computation, the contract or loan shall be void ... ." Small loan laws providing a BFE defense were expressly limited by their terms to "...bona fide error[s] in computation ... ." Uniform Small Loan Law § 13(c); *see, e.g.*, *Katsaros v. O. E. Saugstad Co.*, 197 Cal.App.2d 745, 746, (1961) (quoting Cal. Civ. Code § 2982(c), (e); 2983.1); *Dusenberry v. Taylor's*, 325 P.2d 910, 912, n. 3 (Utah 1958) (quoting Title 15-1-2a, subd. B(5), Utah Code Ann.1953); Note, *Prepayments, Refunds and Confusion under the Automobile Sales Act*, 2 Stan. L. Rev. 362, 366 (1950).

introduced in the Senate each provided a BFE defense, however the language of the defense in the Senate versions differed from the House versions in one respect – the last clause of the defense required "the maintenance of procedures reasonably adapted to assure compliance." S. 918, §813(c) (emphasis added); S. 656 §813(c); S. 1130 §805(c). This language is similar to the defense provided in the Fair Credit Reporting Act, 15 U.S.C. §§ 1681d(c), 1681m(c).

Congressman Annunzio testified and offered a statement in support of the House Bill, stating his view that the BFE defense was intended to ensure that "there is no liability under the civil liability section for good faith unintentional violations." *Senate Hearings, supra*, 16-28, 19 (Statement of Frank Annunzio).[20] In addition, the American Retail Federation (ARF) was asked:

> Both you and Senator Garn mentioned that the civil liabilities sections of these bills will serve as a tool for harassment. Why are you not protected, as Congressman Annunzio claims, by the provisions of the bills that excuse unintentional violations?

Senate Hearings, supra, 201-02 (Statement of Julia Boyd).

In response, ARF prophesied that the BFE defense could be construed as limited to clerical

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[20] *See also Hearings on H.R. 11969*, at pp. 255-56 (Statement of Richard Gross). The bills were also criticized because of criminal penalties, regulatory costs, vagueness, due process, and First Amendment concerns. *Senate Hearings, supra*, 179-87, 185 (Statement of Congressman Charles E. Wiggins).

errors, as the TILA BFE had been, and not protect "against errors in interpreting the meaning of the legislation." *Id.* at pp. 202 (citing cases holding § 130(c) of TILA was limited to clerical errors).

During the markup session, the following discussion took place:

> The Chairman: I think Mr. Abshire would like to comment.
> Mr. Abshire: The problem under Truth in Lending with this section, which is fairly similar, (C), on page 19, has been that the courts have construed that as only protecting against a mathematical error. Now it would be helpful if - as I gather this is not Senator Riegle's intention here - that this go beyond that - that the legislative history of this bill show that this section in debt collection is intended to go beyond that and allow the court discretion to dismiss a violation where it was a technical error.
> Senator Riegle: Lew, why don't you respond to this before I do?
> Mr. Taffer: Well, the wording of the section I think is quite clear that it would apply to *any violation of the act which was unintentional*. In the truth in lending it refers to clerical errors, but that's only because of the nature of truth in lending. We have a different type of statute here.

> The Chairman: **So it's not simply a mathematical error but any bona fide error without intent?**
> Mr. Taffer: That's correct.

Senate Comm. on Banking, Housing & Urban Affairs, Markup on Debt Collection Legislation 20-21 (July 26, 1977) (emphasis added).

Had the Senate endorsed the view expressed by ARF that the BFE defense would be narrowly construed in the same manner as TILA, it certainly could have said so. Instead, the Senate Report endorsed the view presented by Congressman Annunzio and expressly rejected the notion that the BFE defense would not apply to "errors in interpreting the meaning of the legislation," by stating that the BFE defense was available when a debt collector "violates the act in any manner, including with regard to the act's coverage" when the violation was "unintentional and occurred despite procedures designed to avoid such violations." S. Rep. No. 95-382, *supra*, at 5.

a. Legislation *in pari materia* supports the view that Congress intended the FDCPA BFE defense to be construed independently of TILA. Congress has amended TILA's § 1640 several times, including in 1976 when it added Part E to the Consumer Credit Protection Act, Consumer Leasing Act of 1976, Pub. L. 94-240, 90 Stat. 257 (1976). *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 55 (2004). Rather than restate remedies and defenses to claimed violations of the Consumer Leasing Act in a separate section, Congress amended TILA to provide that Consumer Leasing Act violations were subject to the same remedies and

defenses available under TILA. *Id.*; *see* 15 U.S.C. § 1640(a), as amended.[21]

If Congress wanted to provide a consumer with TILA remedies and defenses for a violation of the FDCPA, it could have done so in the same manner it utilized when enacting the Consumer Leasing Act in 1976. Instead, the legislative history shows that Congress intended the FDCPA BFE defense to depart from prior interpretations of TILA's BFE defense and to apply to errors of law.[22]

5. The Availability of a Good Faith Legal Error Inclusive BFE Defense Will Not Thwart the FDCPA Policy of Consumer Protection.

When TILA was enacted in 1968, it provided consumers with a right of rescission for non-disclosure under 15 U.S.C. § 1635, along with an action for damages as a remedy for any other form of non-compliance under 15 U.S.C. § 1640. TILA provided that states could obtain an exemption as long as state law provided substantially similar consumer protection. 15 U.S.C. § 1633. Oklahoma was one of seven states to seek an exemption from TILA by adopting the 1968 version of the Uniform Consumer Credit Code (UCCC), drafted by the National Conference of Commissioners on Uniform

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[21] "Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part, *including any requirement under section 1635 of this Title, subsection (f) or (g) of section 1641 of this Title, or part D or E of this subchapter* ... .") (emphasis added); *see also* 15 U.S.C. § 1667d (1980).

[22] *See generally Hearings on H.R. 11969, supra;* S. Rep. No. 95-382, *supra*, at 2; H.R. Rep. No. 95-131, at 3 (1977).

State Laws.[23] Like TILA, the UCCC provided consumers with a right of rescission under UCCC section 5.202 and a right of action for damages under section 5.203, both of which were subject to a BFE defense. UCCC §§ 5.202(7), 5.203(3). Section 1640 was expressly amended to restrict the BFE defense to clerical errors in 1980.[24] Pub. L. 96-221, Title VI, § 615, 94 Stat. 180 (1980); S. Rep. No. 96-368, at 31-32 (1980), *reprinted in* 1980 U.S.C.C.A.N. 236, 267-268. "In 1982 the Oklahoma legislature amended section 5-203(3) [but not 5-202(7)] to follow an identical amendment to the BFE defense contained in [TILA], 15 U.S.C. § 1640 (1982)." *Rea v. Wichita Mortg. Corp.*, 747 F.2d 567, 574-75 (10th Cir. 1984). The Tenth Circuit was confronted with two BFE defenses, one of which was limited expressly to clerical errors, the other was not. *Id.* The Appellants argued that the absence of a clerical error limitation in section 5-202(7) meant that an error in legal judgment could constitute a bona fide error within the meaning of that section, while the Appellees argued errors in legal judgment were not included, as a result of the amendment to section 5-203(3), and settled interpretations of 15 U.S.C § 1640. *Rea*, *supra*, 747

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[23] *See* ULA, Consumer Credit Code (1968) refs. & annots. (citing Colo. Rev. Stat. §§ 5-1-101 to 5-9-10; Ind. Code §§ 24-4.5-1-101 to 24-4.5-7-414; S.C. Code Ann. §§ 37-1-101 to 37-6-415; Utah Code Ann. §§ 70C-1-101 to 70C-9-102; Wis. Stat. §§ 421.101-427.105; Wyo. Stat. Ann. §§ 40-14-101 to 40-14-702).

[24] At the same time, Congress enlarged the time for voluntary correction of errors from 15 days to 60 days, and limited creditor liability under TILA to those material nondisclosures that were, in fact, detrimentally relied on by consumers, with the intent of eliminating technical violations as a source for TILA liability. S. Rep. No. 96-368, at 31-32 (1980), *reprinted in* 1980 U.S.C.C.A.N. 236, 267-268.

F.2d at 575. Siding with Appellants, the Court observed:

> To begin with, we find it controlling that the Oklahoma legislature expressly amended section 5-203(3) so as to preclude bona fide legal error as a defense, and at the same time left section 5-202(7) untouched. In the absence of any evidence or authority to the contrary, we are unwilling to attribute this simply to legislative inadvertence or error. ... By negative inference, ... errors [in legal judgment] may be a defense where other types of UCCC violations are concerned and section 5-202(7) is applicable.

Id. at 575; *see also Johnson v. Riddle*, 305 F.3d 1107, 1122-23 (10th Cir. 2002) (quoting *Jenkins v. Heintz*, 124 F.3d 824, 832 n. 7 (7th Cir. 1997)).

The *Rea* Court noted that the 1982 amendment to section 1640 was intended to settle a conflict in interpretations, with "the weight of authority apparently supported the views espoused in *Ratner v. Chemical Bank*, 329 F.Supp. 270 (S.D.N.Y. 1971) ... that 15 U.S.C. § 1640(c) applied only to clerical types of errors." 747 F.2d at 575, n. 8. Addressing *Ratner's* observation that ignorance of or mistakes about the law are no excuse, the *Rea* Court observed:

> [R]eliance on the advice of legal counsel is recognized as a valid defense in both civil and criminal contexts. While such reliance is not an

> absolute defense, it is a factor to be considered in determining a defendant's good faith, willfulness, or illegal intent ....
> Because reliance on advice of legal counsel may be relevant to a creditor's good faith, we hold that such reliance is within the scope of the section 5-202(7) defense.

747 F.2d at 576.

Rejecting the argument that permitting legal errors to underlie BFE defenses was contrary to the consumer protection aims of the UCCC, the *Rea* Court held:

> We do not believe that the availability of good faith legal error as a defense will serve to thwart the policy of consumer protection that underlies the UCCC. Any creditor attempting to use this affirmative defense must establish good faith error by a preponderance of the evidence. *See* Okla. Stat. tit. 14A, § 5-202(7). In addition, where, as in this case, the error is predicated upon reliance on legal advice, a creditor must show that such reliance was reasonable under the circumstances.

Id. at 576 (collecting cases).

This Court should follow the reasoning of the *Rea* Court that including legal errors within the scope of the FDCPA's BFE defense does not undercut consumer protection public policies.

6. The Common Law Origin and Use of the Phrase *Bona Fide* Error Included Errors of Legal Judgment.

The common law origin and use of the phrase *bona fide* error also supports the notion that the phrase was intended to include errors of legal judgment. "[A] common law term in a statute comes with a common law meaning, absent anything pointing another way ... ." *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47, 58 (2007). Referring to an error which was "bona fide," this Court observed in *Stewart v. Sonneborn*, 98 U.S. 187, 196 (1878) (involving a malicious prosecution claim): "These cases, and many others that might be cited, show that if the defendants in such a case as this acted *bona fide* upon legal advice, their defence is perfect." There is no basis to argue that Congress was unaware that the common law interpretation of a "bona fide" error included an error in law as observed by the Court in *Stewart*. Indeed, the failure to set forth an express exclusion of legal errors supports the conclusion that Congress did understand that at common law, a bona fide error included legal errors as well.

7. Allowing a Bona Fide Error to Include an "Error of Legal Judgment" Is Consistent with Congressional Intent.

When the FDCPA is read as a whole, permitting the BFE defense to be premised on a good faith error in legal judgment is consistent with the purpose and scope of the Act. The FDCPA provides that the BFE defense can be raised "in any action brought under" the FDCPA for a failure to comply with any provision of the FDCPA. 15 U.S.C. § 1692k(c). "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some

indiscriminately of whatever kind.'" *Ali v. Federal Bureau of Prisons*, 128 S.Ct. 831, 835-36 (2008) (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997)). Courts have addressed many FDCPA cases that arise from errors involving the exercise of legal judgment, alone or as a mixed question of law and fact. There is no reason to conclude that when Congress said the BFE defense can be raised in "any" action, it really meant that it could not be raised in any of these myriad of actions.

a. In recent years, Courts have found everything penned by lawyers in litigation to be actionable under the FDCPA, including summons;[25] pleadings, affidavits, forms and attachments;[26] motions;[27] interrogatories, admissions and deposition notices;[28] and writs of garnishment.[29] Courts have reasoned that since *Heintz v. Jenkins*, 514 U.S. 291 (1995) found the Act contained no implied exception

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[25] *Senftle v. Landau*, 390 F.Supp.2d 463, 472 (D. Md. 2005); *Frye v. Bowman, Heintz, Boscia, Vician, P.C.*, 193 F.Supp.2d 1070, 1080-81, n. 7 (S.D. Ind. 2002).

[26] *Hartman v. Great Seneca Financial Corp.*, 569 F.3d 606, 612-14 (6th Cir. 2009); *Miller v. Javitch, Block & Rathbone*, 534 F.Supp.2d 772, 776 (S.D. Ohio 2008); *Gionis v. Javitch, Block & Rathbone, LLP*, 405 F.Supp.2d 856, 864-68 (S.D. Ohio 2005), *aff'd* 238 Fed.Appx. 24 (6th Cir. 2007), *cert. denied* 128 S.Ct. 1259 (2008).

[27] *Riley v. Giguiere*, 631 F.Supp.2d 1295, 1304-05 (E.D. Cal. 2009).

[28] *Sayyed v. Wolpoff & Abramson*, 485 F.3d 226, 227 (4th Cir. 2007); *McCollough v. Johnson, Rodenberg & Lauinger*, 610 F.Supp.2d 1247, 1255-56, (D. Mont. 2009).

[29] *Lee v. Javitch, Block & Rathbone, LLP*, 522 F.Supp.2d 945, 953-54 (S.D. Ohio 2007); *Stewart v. Cheek & Zeehandelar, LLP*, 252 F.R.D. 387, 395 (S.D. Ohio 2008); *Gallagher v. Gurstel, Staloch & Chargo, P.A.*, No. 08-CV-1189 (PJS/RLE), -- F.Supp.2d --, 2009 WL 2337130, *5-6 (D. Minn. July 29, 2009).

for litigation attorneys, by necessity, all collection litigation is regulated by the FDCPA, subject only to the BFE defense. *Sayyed v. Wolpoff & Abramson*, 485 F.3d 226, 230-31 (4th Cir. 2007); *Hartman v. Great Seneca Financial Corp.*, 569 F.3d 606, 615-16 (6th Cir. 2009).

b. Under the FDCPA, 15 U.S.C. § 1692i requires a lawsuit to be filed in a "judicial district" where the consumer resides when the action was commenced or where the contract was signed. *See* 15 U.S.C. § 1692i(a)(2)(A),(B); *see also* S. Rep. No. 95-382, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1699;[30] *Hester v. Graham, Bright & Smith, P.C.*, 289 Fed.Appx. 35, 37 (5th Cir. 2008); *Fox v. Citicorp Credit Services, Inc.*, 15 F.3d 1507, 1511 (9th Cir.

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[30] Throughout the 1970s, the FTC pursued claims against creditors under the FTC Act for "forum abuse," that is, the practice of collecting allegedly defaulted debts by filing lawsuits in forums far distant from the consumer's residence. Alan K. Chen, *Due Process as Consumer Protection: State Remedies for Distant Forum Abuse*, 20 Akron L. Rev. 9, 10-20 (1986). FTC Staff Report on Debt Collection Hearings (April 1973), *quoted in In re Spiegel, Inc.*, 86 F.T.C. 425, 441-43 (1975). The FTC developed its "fair venue standards" to combat this practice, and ordered violating companies to "cease and desist from instituting suits except in the county where the defendant resides at the commencement of the action, or in the county where the defendant signed the contract sued upon." *Spiegel v. FTC*, 540 F.2d 287, 290 (7th Cir. 1976); *accord In the Matter of Montgomery Ward & Co., Inc.*, 84 F.T.C. 1337 (1974); *In the Matter of West Coast Credit Corp.*, 84 F.T.C. 1328 (1974); *In the Matter of New Rapids Carpet Center*, 90 F.T.C. 64 (1977); *In the Matter of State Credit Association, Inc.*, 86 F.T.C. 502 (1975); *In the Matter of Commercial Service Co., Inc.*, 86 F.T.C. 467 (1975). When it enacted Section 1692i of the FDCPA, Congress intended to "adopt[] the 'fair venue standards' developed by the Federal Trade Commission." S. Rep. No. 95- 382, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1699.

1994). Failure to file suit in the correct court constitutes noncompliance with the FDCPA. *See, e.g., Canady v. Wisenbaker Law Offices, P.C.*, 372 F.Supp.2d 1379, 1384 (N.D. Ga. 2005). Courts have recognized that picking the correct venue involves a mixed question of law and fact, to which the BFE defense applies. *See Chrysler Financial Co. v. Bergstrom*, 703 N.W.2d 415, 417-23 (Iowa 2005).[31]

c. Sections 1692e(2)(A), 1692f(1) of the FDCPA prohibit the false representation of "the character, amount, or legal status of any debt" and "[t]he collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law." *Turner v. J.V.D.B. & Associates, Inc.*, 330 F.3d 991, 995 (7th Cir. 2003); *Johnson, supra*, 305 F.3d at 1117-18. If the debt collector attempts to collect an amount before the right to a fee accrues; if state law prohibits the collection of fees, or if the amount sought is a fixed sum as opposed to a reasonable sum, the attempt to do so could violate 15 U.S.C. sections 1692e, 1692e(2)(A), (5), (10), as well as 1692f and 1692f(1). *See Gathuru v. Credit Control Services, Inc.*, 623 F.Supp.2d 113, 117-21 (D. Mass. 2009); *Gionis v. Javitch, Block & Rathbone, LLP*, 405 F.Supp.2d 856, 864-65 (S.D. Ohio 2005), *aff'd* 238 Fed.Appx. 24 (6th Cir. 2007), *cert. denied* 128 S.Ct. 1259 (2008); *Som v. Daniels Law Offices, P.C.*, 573 F.Supp.2d 349, 358, (D. Mass. 2008). Evaluation of the debt, the governing agreement and state law made in an effort to comply

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[31] Construing Iowa Code § 537.5201(7) (modeled after the 1974 version of the UCCC).

with sections 1692e(2)(A) and 1692f(1) is not clerical – it is substantively legal, and the BFE defense must apply to the action. *See Freyermuth v. Credit Bureau Servs.*, 248 F.3d 767, 770 (8th Cir. 2001); *Pollice v. Nat'l Tax Funding, L.P.*, 225 F.3d 379, 407 (3d Cir. 2000).

d. Similarly, courts have held that filing a lawsuit subject to any affirmative defense can violate 15 U.S.C. sections 1692e, 1692e(2)(A), (5), (10), as well as 1692f and 1692f(1). *See* Fed. R. Civ. P. 8(c)(1); *see, e.g., Turner v. J.V.D.B. & Associates, Inc.*, 202 Fed.Appx. 123, 125 (7th Cir. 2006) (bankruptcy); *Pincus v. Law Offices of Erskine & Fleisher*, 617 F.Supp.2d 1265, 1267-70 (S.D. Fla. 2009) (estoppel); *McCorriston v. L.W.T., Inc.*, 536 F.Supp.2d 1268, 1276-77 (M.D. Fla. 2008) (statute of limitations); *Conner v. Howe*, 344 F.Supp.2d 1164, 1173 (S.D. Ind. 2004) (illegality); *Eckert v. LVNV Funding LLC*, No. 4:08CV01802(ERW), -- F.Supp.2d --, 2009 WL 2253518, *5 (E.D. Mo. July 28, 2009) (uncredited payment). Courts have also held that filing suit and seeking more than a debtor is legally obligated to pay, violates the FDCPA. *See Eckert v. LVNV Funding LLC*, supra at *5.

e. The FDCPA prohibits a debt collector from making a "representation ... that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person **unless such action is lawful** and the debt collector or creditor intends to take such action." 15 U.S.C. §1692e(4) (emphasis added). Similarly, the FDCPA forbids a debt collector from threatening "to take any action that **cannot legally be taken** or that is not

intended to be taken." 15 U.S.C. § 1692e(5) (emphasis added.) These sections require the exercise of legal judgment. *Compare Guidry v. Clare*, 442 F.Supp.2d 282, 290 (E.D. Va. 2006) *with Gradisher v. Check Enforcement Unit, Inc.*, 210 F.Supp.2d 907, 917 (W.D. Mich. 2002).

f. The FDCPA prohibits "[t]aking or threatening to take any nonjudicial action to effect dispossession or disablement of property if (A) there is no present right to possession of the property claimed as collateral through an enforceable security interest; (B) there is no present intention to take possession of the property; or (C) the property is exempt by law from such dispossession or disablement." 15 U.S.C. §1692f(6). Making the determination that property is subject to an enforceable security interest, that it can be repossessed, and that it is not subject to any exemption at law involves legal decision-making. *Krajewski v. American Honda Finance Corp.*, 557 F.Supp.2d 596, 601, 604-05, 618 (E.D. Pa. 2008).

If a lawyer can be held liable in an FDCPA action for these traditionally legal activities (that cannot be performed by those without a law license), then the BFE defense must be read to include "errors in legal judgment." J. Flaccus, *Fair Debt Collection Practices Act: Lawyers And The Bona Fide Error Defense*, 2001 Ark. L. Notes 95, 96-103. Otherwise, courts are crafting a nonexistent exception to the statutory language of the BFE defense, limiting its application from "*any*" claim to something significantly less than "*any*" claim.

B. Framework for Evaluating Whether a Legal Error Was the Result of a Bona Fide Error.

Three elements are required to establish the BFE defense: (1) an unintentional violation; (2) a bona fide error and (3) maintenance of procedures reasonably adapted to avoid "any such error." 15 U.S.C. §1692k(c); *Johnson, supra*, 305 F.3d at 1121.

Circuit decisions have uniformly held the first prong has a subjective focus, and requires only a negation of specific intent to violate the FDCPA. *Johnson v. Riddle*, 443 F.3d. 723, 728 (10th Cir. 2006); *Lewis v. ACB Bus. Serv., Inc.*, 135 F 3d 389, 402 (6th Cir. 1998); *Kort v. Diversified Collection Servs., Inc.*, 394 F.3d 530, 537 (7th Cir. 2005).

Regarding the second element, a "bona fide error", is one "made in good faith; a genuine mistake, as opposed to a contrived mistake." *Kort, supra,*, 394 F.3d at 538. In light of the types of errors that the FDCPA addresses, "whether the debt collector's mistake was bona fide will often turn on the debt collector's due diligence practices." *Johnson, supra*, 443 F.3d at 729. As applied to legal errors, only attorneys "may make a core legal decision as to whether a particular practice is permitted by law. Thus, in order for ... [a legal] mistake to have been bona fide ... [the attorney] must have employed procedures to avoid committing an error, and those procedures must have been reasonably adapted to avoiding the core legal error that occurred." *Johnson, supra*, 443 F.3d. at 723-30.

Exercising legal judgment in the course of collecting debt so as to avoid violating the law, is no less a 'procedure reasonably adapted' because it is performed by an attorney, rather than a computer.

Well-established frameworks for evaluating whether an attorney acted in "good faith" exist under Section 1983's qualified immunity "clearly established law" standard, in criminal cases to negate unlawful intent, in tort proceedings involving legal malpractice, and under Fed.R.Civ. P. Rule 11. Each is addressed in turn.

1. The "Clearly Established Law" Standard under 42 U.S.C. Section 1983.

Under 42 U.S.C. section 1983, government actors are entitled to qualified immunity "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 129 S.Ct. 808, 815 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

> The protection of qualified immunity applies regardless of whether the government official's error is "a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." ...
> This inquiry turns on the "objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken." ...
> In *Wilson*, we explained that a Circuit split on the relevant issue had developed after the events that gave rise to suit and concluded that "[i]f judges thus disagree on a constitutional question, it is unfair to subject police to money damages for

> picking the losing side of the controversy." 526 U.S., at 618, 119 S.Ct. 1692. Likewise, here, where the divergence of views ... was created by the decision of the Court of Appeals in this case, it is improper to subject petitioners to money damages for their conduct.

Pearson, *supra*, 129 S.Ct. at 822 (quoting *Groh v. Ramirez*, 540 U.S. 551, 567 (2004) (Kennedy, J., dissenting) and *Wilson v. Layne*, 526 U.S. 603, 614, 618 (1999)); *see also* Flaccus, *supra*, 2001 Ark. L. Notes at 96-103.

The "clearly established law" standard requires precedent from the U.S. Supreme Court, the controlling circuit, the highest court in the state; "a consensus of cases of persuasive authority" from other jurisdictions, or in the absence of controlling precedent, where the conduct is obviously unlawful. *See Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987); *Wilson v. Layne*, 526 U.S. 603, 614-18 (1999). A conflict in the lower courts is a strong indication that the law was not clearly established. *Wilson*, *supra*, 526 U.S. at 617-18.

The BFE defense involves a balancing of interests similar to those involved in the qualified immunity context; debt collectors must be permitted to proceed lawfully when seeking to collect money due from a consumer, but they should be held accountable if they exercise their power unreasonably. *Pearson v. Callahan*, 129 S.Ct. 808, 815.

Unlike the qualified immunity doctrine, the BFE defense does not provide an immunity from suit; it is only a defense to liability. Thus, using the

"clearly established law" standard in assessing the BFE defense under the FDCPA, would not alter the framework established by Congress.

2. Advice of Counsel Used to Negate Specific Intent.

Federal Circuit Courts recognize that a mistaken view of the law's requirements premised on the advice of counsel can be used to negate a specific intent required as an element of a criminal offense. *See, e.g., United States v. Van Allen*, 524 F.3d 814, 823 (7th Cir. 2008); *United States. v. Rice*, 449 F.3d 887, 896-97 (8th Cir. 2006); *United States v. Wenger*, 427 F.3d 840, 853 (10th Cir. 2005); *United States v. West*, 392 F.3d 450, 457 (D.C. Cir. 2004); *United States v. Petrie*, 302 F.3d 1280, 1287 (11th Cir. 2002); *United States v. Smith*, 7 Fed.Appx. 772, *1 (9th Cir. 2001); *United States v. Polytarides*, 584 F.2d 1350, 1352-53 (4th Cir. 1978). In this context, good faith is made out when a defendant shows:

> (1) before taking action, (2) he in good faith sought advice of attorney whom he considered competent, (3) for purpose of securing advice on lawfulness of his possible future conduct, (4) and made full and accurate report to his attorney of all material facts which defendant knew, (5) and acted strictly in accordance with advice that his attorney gave after receiving this full report.

Van Allen, supra, 524 F.3d at 823 (quoting *United States v. Al-Shahin*, 474 F.3d 941, 947 (7th Cir. 2007)).

As in the cited criminal cases, the first prong of the BFE defense has an intentional element. *See, e.g., Johnson, supra*, 443 F.3d at 728. Similarly, the reasoning behind applying an advice of counsel defense in the criminal context is equally applicable in the context of FDCPA violations.

3. The Legal Malpractice Standard.

In the legal malpractice context, when an attorney makes a mistake which is the result of an honest exercise of professional judgment, no liability attaches so long as the attorney "acts with a proper degree of skill, and with reasonable care and to the best of his knowledge." *National Sav. Bank v. Ward*, 100 U.S. 195, 198 (1879); *see, e.g., Kirsch v. Duryea*, 578 P.2d 935, 938 (Cal. 1978); *Biomet Inc. v. Finnegan Henderson LLP*, 967 A.2d 662, 665-66 (D.C. 2009).

> An attorney is not liable for an error of judgment regarding an "unsettled proposition of law" and that if "reasonable attorneys could differ with respect to the legal issues presented, the second-guessing after the fact of ... professional judgment [i]s not a sufficient foundation for a legal malpractice claim." ... The law is not static, it ever-evolves and changes, and so "[b]ecause of those concerns, the rule that an attorney is not liable for an error of judgment on an unsettled proposition of law is universally recognized."

Biomet Inc., supra, 967 A.2d at 665-66 (citations

omitted); *compare* 7 Am. Jur. 2d *Attorneys at Law* § 208 (2009) *with In re TCW/Camil Holding L.L.C.*, 330 B.R. 117, 128-29 (D. Del. 2005); *see also* Restatement (Second) of Torts § 666 (1977) (good faith reliance on advice of counsel is available as a defense to malicious prosecution).

The sound public policy underpinnings of this legal malpractice defense, sometimes referred to as the "attorney judgment rule," are equally applicable in the FDCPA context. Collection attorneys have duties to their client to assert legally tenable positions. And yet, if those positions are ultimately rejected by the Court, the collection attorney can face FDCPA liability. This Court recognized this critical issue in *Heintz v. Jenkins*, but ultimately determined that the BFE defense would prevent such anomalies. *Heintz*, 514 U.S. at 295-96.

4. The Rule 11 Standard.

Rule 11 also provides a framework established by this Court and approved by Congress that balances the competing needs of advocates, the judicial system and adversaries. *See* Fed. R. Civ. P. 11. An attorney's duty of inquiry required by Rule 11 and its state counterparts is measured by an objective "reasonableness under the circumstances" standard. *See Napier v. Thirty or More Unidentified Agents*, 855 F.2d 1080, 1090-91 (3d Cir. 1988); *see also* Advisory Committee on Rules, 1983 Amendment, Fed. R. Civ. P. 11, *reprinted in* 97 F.R.D. 165, 199. In applying this standard, the "court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted." 97 F.R.D. 165, 199; *accord Cooter & Gell v. Hartmarx*

Corp., 496 U.S. 384, 393 (1990); *see also Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533, 542-43 (1991).

This same balance between the competing interests of advocates, the judicial system, and adversaries can only be achieved in the context of FDCPA actions if the BFE defense applies to legal errors. In the absence of a robust BFE defense, collection attorneys will be repeatedly torn between their fiduciary duties to the clients and duties to their client's adversaries created by the FDCPA.

5. Integrated "Reasonable Under the Circumstances" Standard.

In light of the foregoing, an objective test, considering what was reasonable for an attorney to believe at the time and under the circumstances, would be a proper test for evaluating good faith mistakes of law, mistakes of fact, or mistakes based on mixed questions of law and fact. This would be entirely consistent with the intent of the FDCPA. *See, e.g., Charbonneau v. Mary Jane Elliott, P.C.*, 611 F.Supp.2d 736, 743 (E.D. Mich. 2009); *Kirk v. Gobel*, 622 F.Supp.2d 1039, 1049 (E.D. Wash. 2009).

In making the determination in this case, a reasonable person in respondents' position would not have known or have been able to predict how the Sixth Circuit would rule on the question in the face of a circuit conflict. It would be improper to expose respondents to money damages for "picking the losing side of the controversy." *Pearson v. Callahan*, 129 S.Ct. 808, 822 (quoting *Wilson v. Layne*, 526 U.S. 603, 614, 618); *compare Hope v. Pelzer*, 536 U.S. 730, 741 (2002). It is hard to imagine that Congress intended debt collectors to send one form of letter to people in the Third Circuit, following the holding in

Graziano and another form of notice in the Ninth Circuit because the holding under *Camacho* requires a different notice.

Because there is no indication that Congress believed debt collectors or their attorneys were endowed with prescience, amici OCAA and CCBA urge the Court to affirm the Sixth Circuit's decision and find that the BFE defense applies to legal errors, and that a debt collector may avoid liability under the FDCPA's BFE defense by showing the law on the subject in controversy was not clearly established.

CONCLUSION

The judgment below should be affirmed. Congress did not mean to impose liability on debt collectors who do not correctly anticipate the ultimate resolution of issues that have divided the federal courts in ways that could trigger strict liability in either direction. Nor did Congress intend to chill a collection attorney's representation of his client because of the potential for liability under the FDPCA.

Respectfully Submitted,

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AMICUS CURIAE BRIEF

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No. 08-1200

IN THE

Supreme Court of the United States

KAREN L. JERMAN

Petitioner,

v.

CARLISLE, MCNELLIE, RINI, KRAMER & ULRICH, LPA AND ADRIENNE S. FOSTER,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF OF PUBLIC CITIZEN, INC., AARP, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, NATIONAL CONSUMER LAW CENTER, AND U.S. PIRG: THE FEDERATION OF STATE PIRGS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Under the Fair Debt Collection Practices Act, a debt collector may avoid liability by showing beyond a preponderance of the evidence that its violation of the Act "was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." 15 U.S.C. § 1692k(c). Does this defense extend to a debt collector's ignorance of the law?

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INTEREST OF AMICI CURIAE

Amici are national, non-profit advocacy organizations committed to the enforcement of consumer-protection laws. Amici thus have a strong interest in ensuring that the federal statutes protecting consumers from overreaching by lenders and debt collectors are not undermined by new defenses that are at odds with congressional intent. In particular, amici are concerned that the unprecedented and sweeping defense proposed by the respondents in this case—absolute immunity from civil liability for illegal collection practices, based on ignorance of the law—would deter enforcement, inhibit the development of precedent, and encourage the very collection abuses that Congress sought to prevent. Details about the individual amici are included in the Appendix.[1]

SUMMARY OF ARGUMENT

To prevail, respondents must convince this Court that at least two unlikely propositions are true.

First, they must demonstrate that, even though the Congress that enacted the Fair Debt Collection Practices Act (FDCPA) in 1977 borrowed verbatim the bona-fide-error defense enacted nine years earlier in Truth in Lending Act (TILA), it nonetheless intended to dramatically depart from the uniform conclusion of the federal courts of appeals that TILA's bona-fide-error defense did not extend to mistakes of law.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission. Letters reflecting the blanket consent of the parties have been filed with the Clerk.

This Court, however, has explained that when a statutory provision has a settled judicial interpretation, the repetition of that same provision in a new statute indicates Congress's intent that the provision bear the same meaning in both statutes. That canon is especially appropriate here because respondents can offer no plausible explanation why Congress would have wanted to use the same language to excuse ignorance of the law under the FDCPA but not under TILA—a far more complex, highly technical statute that applies to a much broader universe of transactions and entities. In fact, both statutes adopted the same solution to problems of legal uncertainty: a safe-harbor defense for reliance on authoritative administrative interpretations. Respondents' interpretation, however, would render that defense superfluous.

Second, respondents must demonstrate that Congress intended to override the venerable rule, deeply enshrined in American law, that ignorance of the law is no excuse. But Congress knows how to require proof of actual knowledge of the law when it wants to, and it did not do so here.

In any event, complete departures from the common-law rule are exceedingly rare, even in criminal cases, and are limited to unusually complex regulatory schemes that impose severe criminal sanctions, extend broadly, and carry the risk of trapping innocents who would likely have had no notice. The FDPCA is none of those things: It is easy to follow, imposes only limited civil liability, and covers only those who are principally or regularly in the business of consumer debt collection and who should therefore be well aware of the Act and its requirements.

The traditional justifications for the presumption against excusing ignorance of the law apply with full force to the FDCPA: The defense respondents propose would encourage lawbreaking, inhibit the development of precedent, deter private enforcement, and overturn the carefully calibrated system of incentives designed by Congress.

Indeed, the danger of excusing ignorance of the law in the debt-collection context is uniquely troubling. Debt collectors—unlike virtually every other private business that regularly interacts with consumers—are unconcerned with consumer goodwill and, absent regulation, have every incentive to maximize collections at the expense of consumer protection. Allowing a mistake-of-law defense would competitively disadvantage collectors that employ scrupulous practices, contrary to Congress's express intent.

When the bona-fide error defense is appropriately limited to non-legal errors, as Congress intended, it creates a powerful incentive for debt collectors to know the law, maintain preventive procedures, and avoid harm to consumers. But, under respondents' approach, debt collectors would be encouraged to concentrate their efforts instead on justifying their own preferred legal rules, regardless of the impact on consumers.

ARGUMENT

I. There Is No Justification for Interpreting Identical Language in TILA and the FDCPA Differently.

A. When It Borrowed TILA's Language, Congress Incorporated Into the FDCPA the Settled Judicial Interpretation of That Language.

When Congress enacted the FDCPA's bona-fide-error defense in 1977, it did not legislate on a blank slate. Instead, Congress copied, word-for-word, the provision it had enacted just nine years earlier in TILA. *Compare* 15 U.S.C. § 1692k(c) (1982), *with* 15 U.S.C. § 1640 (1976). Both statutes provide that a defendant "may not be held liable" if the defendant "shows by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error."

Courts must construe statutory language as Congress would have contemplated it at the time of enactment. *Dixon v. United States*, 548 U.S. 1, 12 (2006). At the time Congress enacted the FDCPA, the federal courts of appeals uniformly took the view that TILA's bona-fide-error defense did not extend to ignorance or mistakes of law.[2] The overwhelming majority of federal

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[2] *See Ives v. W.T. Grant Co.*, 522 F.2d 749, 757-58 (2d Cir. 1975); *Haynes v. Logan Furniture Mart, Inc.*, 503 F.2d 1161, 1166-67 (7th Cir. 1974); *Turner v. Firestone Tire & Rubber Co.*, 537 F.2d 1296, 1298 (5th Cir. 1976); *Palmer v. Wilson*, 502 F.2d 860, 861 (9th Cir. 1974); *see also McGowan v. King, Inc.*, 569 F.2d 845, 849-50 (5th Cir. 1978) (relying on pre-1977 cases).

district courts and state courts agreed.[3] *See* Annotation, *What constitutes truth-in-lending act violation which 'was not intentional and resulted from a bona fide error,' within meaning of § 130(c) of act (15 U.S.C.A. § 1640(c))*, 27 A.L.R. Fed. 602 (1976).

The Congress that enacted the FDCPA in 1977 presumably knew how TILA's identical language had been construed, and presumably intended the FDCPA provision to bear the same meaning. *See United States v. Hayes*, 129 S. Ct. 1079, 1086 (2009). This Court has repeatedly explained that "when judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its judicial interpretations as well." *Rowe v. New Hampshire Motor Transport Ass'n*, 128 S. Ct. 989, 994 (2008); *see Lorillard v. Pons*, 434 U.S. 575 (1978).

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[3] *See, e.g., In re Dickson*, 432 F. Supp. 752 (W.D.N.C. 1977); *Ballew v. Assocs. Fin. Servs.*, 450 F. Supp. 253, 271 (D. Neb. 1976); *Sambolin v. Klein Sales Co.*, 422 F. Supp. 625 (S.D.N.Y. 1976); *Houston v. Atlanta Fed. Sav. and Loan Ass'n*, 414 F. Supp. 851, 857-58 (N.D. Ga. 1976); *Gerasta v. Hibernia Nat'l Bank*, 411 F. Supp. 176, 190 n.41 (E.D. La. 1976); *Wilson v. Shreveport Loan Corp.*, 404 F. Supp. 375 (W.D. La. 1975); *Powers v. Sims & Levin Realtors*, 396 F. Supp. 12, 20 n.7 (E.D. Va. 1975); *Starks v. Orleans Motors*, 372 F. Supp. 928, 931 (E.D. La. 1974), *aff'd*, 500 F.2d 1182 (5th Cir. 1974); *Johnson v. Assocs. Fin., Inc.*, 369 F. Supp. 1121, 1123-24 (S.D. Ill. 1974); *Buford v. Am. Fin. Co.*, 333 F. Supp. 1243 (N.D. Ga. 1971); *Douglas v. Beneficial Fin. Co.*, 334 F. Supp. 1166, 1178 (D. Alaska 1971); *Ratner v. Chem. Bank N.Y. Trust Co.*, 329 F. Supp. 270 (S.D.N.Y. 1971); *Lowery v. Fin. Am. Corp.*, 231 S.E.2d 904, 911 (N.C. App. 1977); *Jefferson v. Mitchell Select Furniture Co.*, 321 So. 2d 216, 222 (Ala. Civ. App. 1975). Only a single reported federal decision deviated from the consensus, *Welmaker v. W.T. Grant Co.*, 365 F. Supp. 531 (N.D. Ga. 1971), and that decision had been widely discredited by 1977.

That canon of construction is particularly appropriate here because the FDCPA and the TILA share a common statutory framework as subchapters of the Consumer Credit Protection Act, 15 U.S.C. §§ 1601-1693r. It would have been especially strange for the Congress that enacted the FDPCA to have used the same language to mean two very different things within the same "package of statutes." *Cannon v. University of Chicago*, 441 U.S. 677, 699 (1979); *cf.* 15 U.S.C. § 1601 note (defining common "grammatical usage" for entire CCPA). Respondents' position "would create a disjunction between these two provisions that Congress could not have intended." *Hayes*, 129 S. Ct. at 1086.

As of 1977, the federal courts interpreting the bona-fide-error defense had identified four principal reasons why the defense did not apply to mistakes of law, largely following the analysis of the first decision to carefully examine the question, *Ratner v. Chemical Bank New York Trust Co.*, 329 F. Supp. 270 (S.D.N.Y. 1971). *See Ives*, 522 F.2d at 757-58 ("expressly adopt[ing] the reasoning . . . in *Ratner*"). Each one of those four reasons applies with full force to the FDCPA. Because Congress is presumed to know the law, the federal courts' pre-1977 interpretation of the very same language provides the best evidence of what Congress intended the FDCPA's language to mean. *Cannon*, 441 U.S. at 697-98.

First, and most importantly, the federal circuits uniformly read the term "intentional" to refer to intent to carry out *the acts* constituting violations of the law, not specific intent to violate *the law* itself. As *Ratner* put it: "It is undisputed that that defendant carefully, deliberately—intentionally—omitted the disclosure in question. That defendant, in this court's view, mistook the law does not make its action any less intentional." 329 F. Supp. at 281; *Haynes*, 503 F.2d at 1166 (rejecting the

view that "intent, as employed in § 1640(c), is directed to the violation of the law itself rather than to acts which constitute violations of the law"). That understanding is consistent with the word's ordinary legal usage. *See Black's Law Dictionary* (8th ed. 2004) (defining "intentional" as "Done with the aim of carrying out *the act*.") (emphasis added). A contrary interpretation would have run the risk of equating an "intentional" violation with a "knowing" and "willful" violation, TILA's standard for criminal liability, even though the bona-fide-error defense concerns only civil liability. *Haynes*, 503 F.2d at 1166; *compare* 15 U.S.C. § 1611 *with* § 1640(c).

Given this widely shared understanding of the key term—"intentional"—in TILA's bona-fide-error defense, Congress's use of the same language indicates an intent to incorporate that understanding. *Morissette v. United States*, 342 U.S. 246, 263 (1952) ("absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them").

Second, the pre-FDPCA courts' interpretation of the term "intentional" was in keeping not only with the ordinary legal meaning of that word, but also with the "normal rule," even in criminal cases, that ignorance of the law is no excuse. *Ratner*, 329 F. Supp. at 281 (citing this Court's cases, including *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971)); *see also Powers*, 396 F. Supp. at 20 n.7 ("The disclosure and standardization policies of the Act would be vitiated should the Court construe § 1640(c) to excuse errors of law as well as mistakes."). Congress's formulation of the bona-fide error defense, in other words, signaled no intent to "carv[e] out an exception to the general rule that ignorance of the law is no excuse." *Int'l Minerals*, 402 U.S. at 563 (reading the phrase "knowingly violates any such regulation" as extending only to "acts or omissions which

violate the Act," not mistakes of law). As we discuss in the second part of this brief, that general rule applies with special force to the FDCPA.

Third, the pre-FDPCA courts read the requirement that a defendant demonstrate the "maintenance of procedures reasonably adapted to avoid any such error" as reinforcing the conclusion that the defense could not sensibly extend to mistakes of law. *Ratner*, 329 F. Supp. at 281 ("The provision is wholly inapposite to deal with errors of law like defendant's, though made in entire 'good faith.' However much clients and others might wish it, nobody has devised . . . 'procedures' Congress could have envisaged to cover such errors of law."); *Haynes*, 503 F.2d at 1167 (concluding that the "procedures" requirement "plainly suggests that the scope of the section was intended to encompass basically only clerical errors"). The fit between the "procedures" requirement and respondents' proposed mistake-of-law defense is no less awkward under the FDCPA.

Fourth, TILA's legislative history supported the courts' reading of the text of the bona-fide-error defense. The House bill had originally required proof of a "knowing" violation to establish civil liability, but that requirement was omitted in response to the Justice Department's objection that "proof of 'specific knowledge' might 'frustrate prospective plaintiffs, and thereby weaken the enforcement provisions of the act.'" *Haynes*, 503 F.2d at 1166 n.6 (quoting legislative history). Moreover, the bona-fide-error defense was added to the Senate version of the bill in response to industry complaints that "mathematical and clerical errors would be inevitable because of the complexity" of the computations required by TILA, further suggesting that the defense was never intended to override the general rule that igno-

rance of the law is no excuse. *See Ratner*, 329 F. Supp. at 281 n.17 (quoting legislative history).

A parallel history played out during Congress's consideration of the FDCPA. Congress rejected a version of the Act sponsored by Senator Jake Garn of Utah (S. 1130), that would have required a showing of fault to establish liability and, in the final markup before the full Senate Banking Committee, rejected an amendment that would have imposed civil liability only for debt collectors who "willfully fail[] to comply" with the Act's requirements. Robert J. Hobbs, *Fair Debt Collection* § 3.2.2 (6th ed. 2008) (describing history). The Act's sponsor, Senator Riegel, explained that if a debt collector violated the act "by accident" and "didn't intend for the effect to be as it was," it could invoke the bona-fide error defense and "say, I didn't know that, or my computer malfunctioned." *Senate Comm. on Banking, Housing & Urban Affairs, Markup Session: S. 1130—Debt Collection Legislation* 60 (July 26, 1977). At the same time, Senator Riegel confirmed that willfulness was not intended to be a prerequisite to civil liability because "certain things ought not to happen, period": the prohibited practices are "illegal and wrong," and "whether somebody does it knowingly, willfully, you know, with a good heart, bad heart, is really quite incidental." *Id.*

Respondents, in effect, ask this Court to give debt collectors what they could not achieve through the legislative process.

B. There Is No Plausible Reason For Congress To Have Created A Mistake-of-Law Defense Under the FDCPA, But Not Under TILA.

Even setting aside the identical language in the two statutes and the judicial interpretation against which Congress legislated, respondents can offer no plausible

explanation for *why* Congress would have wanted the FDCPA, but not TILA, to include a mistake-of-law defense. If anything, it would have made more sense for Congress to have taken the opposite approach, excusing lenders' good-faith mistakes in the face of TILA's dense thicket of thorny disclosure rules, but not excusing independent debt collectors' ignorance of the FDCPA's straightforward prohibitions on abusive and deceptive conduct. In fact, Congress's solution to the problem of legal uncertainty under both statutes was the same: a safe-harbor defense for acts in conformity with authoritative administrative interpretations. *Compare* 15 U.S.C. § 1692k(e) (1982), *with* 15 U.S.C. § 1640(f) (1976).

TILA is, by any measure, far more complex and technical than the FDCPA, and extends to a far larger set of transactions and regulated entities. *See Cowen v. Bank United of Texas, FSB*, 70 F.3d 937, 941 (7th Cir. 1995) (Posner, J.) (observing that "hypertechnicality reigns" under TILA). TILA's already complicated statutory framework is also supplemented by an even more detailed and complicated set of regulations issued by the Federal Reserve Board, which Congress entrusted with wide discretion to interpret and supervise the Act. *See Mourning v. Family Pubs. Serv., Inc.*, 411 U.S. 356, 365 (1973). The entire FDCPA, by contrast, is available in the form of a 21-page, large-print pamphlet published by the Federal Trade Commission.[4]

Soon after TILA's enactment, Congress recognized that "creditors need sure guidance through the 'highly technical' Truth in Lending Act," *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566-67 (1980), but the solution Congress chose was not the general mistake-of-law de-

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[4] http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre27.pdf.

fense that respondents' seek here. Instead, Congress "acted to promote reliance upon Federal Reserve pronouncements," adding amendments in 1974 and again in 1976 that created a safe-harbor defense from liability for acts "done or omitted in good faith in conformity with any rule, regulation, or interpretation" by the Board, or the interpretation of an authorized employee. 15 U.S.C. § 1640(f). The purpose of the 1974 and 1976 amendments was to relieve the creditor of the burden of choosing "between the Board's construction of the Act and the creditor's own assessment of how a court may interpret the Act." S. Rep. 93-278, at 13 (1974); *see Milhollin*, 444 U.S. at 567 (citing 1974 and 1976 legislative history).

One year later, in 1977, Congress enacted the FDCPA. Just as it borrowed TILA's bona-fide-error defense, Congress also borrowed the language of the safe-harbor defense, permitting debt collectors to avoid liability for acts "done or omitted in good faith conformity with any advisory opinion" of the FTC. 15 U.S.C. § 1692k(e). The inclusion of this provision strongly suggests that Congress intended the safe-harbor defense, not respondents' expansive and awkward construction of the bona-fide-error defense, to be the Act's solution to problems of interpretive uncertainty. Indeed, the unavoidable consequence of respondents' position would be to render the FDCPA's safe-harbor defense superfluous: Anything covered by the safe-harbor defense would be covered by the bona-fide error defense anyway, and even reliance on informal staff opinions, which are not encompassed in the safe-harbor defense, would confer immunity.

The Sixth Circuit believed that a clarifying amendment to TILA enacted in 1980—three years *after* the FDCPA—indicated that, "unlike the TILA, Congress did not intend to limit the [FDCPA] defense to clerical

errors." Pet. App. 13a-14a. Actions of "a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Mass. v. EPA*, 549 U.S. 497, 530 n.27 (2007). But to the extent that this post-enactment history is relevant, it confirms rather than undermines the conclusion that the FDCPA does not excuse mistakes of law. The 1980 amendment, part of a comprehensive "simplification" of the TILA, *ratified* the settled pre-1977 interpretation of the language shared by both statutes. And it did not alter the operative language of TILA's bona-fide error defense, but merely added examples clarifying what sorts of errors are and are not covered: "Examples of a bona fide error include, but are not limited to, clerical, calculation, computer malfunction and programming, and printing errors, except that an error of legal judgment with respect to a person's obligations under [TILA] is not a bona fide error." Truth in Lending Simplification and Reform Act, Pub. L. No. 96-221, Tit. VI, § 615(a)(3), 94 Stat. 168, 181 (1980) (codified at 15 U.S.C. § 1640(c)). The Senate Report explained that this amendment simply "clarified" the provision "to make clear that it applies to mechanical and computer errors" and not to "erroneous legal judgments as to the Act's requirements." S. Rep. 73, 96th Cong., 1st Sess. 7-8 (1979).

Because Congress legislated against the backdrop of a settled judicial interpretation, and because respondents cannot even identify a plausible explanation for why Congress would have used identical language to excuse mistakes of law under the FDCPA but not under TILA, their position defies common sense. And "there is no canon against using common sense in construing laws as saying what they obviously mean." *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 125 (2004) (quoting *Roschen v. Ward*, 279 U.S. 337, 339, (1929) (Holmes, J.)).

II. The Rule That Ignorance of the Law Is No Defense Applies With Special Force to the FDCPA.

Congress has long been presumed to legislate against "the general rule that ignorance of the law or a mistake of law is no defense," a presumption that is "deeply rooted in the American legal system." *Cheek v. United States*, 498 U.S. 192, 199 (1991); *see also* 4 William Blackstone, *Commentaries on the Laws of England* 27 (1769). Justice Story, refusing to allow a mistake-of-law defense under a federal statute in 1833, explained that "[t]he whole course of the jurisprudence, criminal as well as civil, of the common law, points to a different conclusion. It is a common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally." *Barlow v. United States*, 32 U.S. 404, 411 (1833). The question here is ultimately the same as it was in *Barlow*: whether "the legislature, in this enactment, had any intention to supersede the common principle." *Id.* at 411. The answer—as far as can be discerned from the text, structure, history, and purpose of the FDCPA—is no.

"When Congress wishes to create a mistake of law defense, it knows how to say so explicitly." Sharon L. Davies, *The Jurisprudence of Wilfulness: An Evolving Theory of Excusable Neglect*, 48 Duke L. J. 341, 406 (1998). Congress has done this, for example, in areas where the criminal law is highly complex. *See, e.g.*, 15 U.S.C. § 80a-48 ("[B]ut no person shall be convicted under this section for the violation of any rule, regulation, or order if he proves that he had no actual knowledge of such rule, regulation, or order.") (securities); *United States v. Murdock*, 290 U.S. 389, 396 (1933) (tax). Congress also sometimes requires "actual knowledge," not as a precondition for civil liability, but as a prerequisite

for certain civil remedies. Thus, the FTC may seek civil penalties against a debt collector who has "actual knowledge" that its "act is unfair or deceptive and is prohibited" by the FDCPA. 15 U.S.C. § 45(m)(1)(A) and (C); *see also* 15 U.S.C. § 1692*l* (incorporation of FTC Act by FDCPA). Congress could easily have added such language to the FDCPA's bona-fide error defense if it had wanted to create an absolute defense to all liability for mistakes of law; the absence of such language strongly suggests that Congress had no intention of doing so. *United States v. Turkette*, 452 U.S. 576, 581 (1981).

A. The FDCPA Presents None of the Concerns—Lack of Fair Notice, Unusual Complexity, or Onerous Criminal Liability—That Have Animated Occasional Departures From the Rule.

Apart from the lack of any textual signal that Congress intended to "carv[e] out an exception to the general rule that ignorance of the law is no excuse," *Int'l Minerals*, 402 U.S. at 563, the FDCPA also does not present any of the concerns that have motivated lawmakers to support such an exception.

An exception is sometimes thought necessary where a law could become a trap for innocent, unsophisticated people who may lack actual notice of complex criminal regulations. *See Liparota v. United States*, 471 U.S. 419, 426 (1985) (requiring proof of knowledge of regulations concerning food-stamp use because they might otherwise punish "a broad range of apparently innocent conduct"); *Lambert v. California*, 355 U.S. 225, 229 (1957) (requiring knowledge of city's registration requirement for newly arrived ex-felons where the "circumstances which might move one to inquire as to the necessity of registration [were] completely lacking").

But the FDCPA's requirements apply only to businesses that engage in debt collection "regularly" or as their "principal purpose." 15 U.S.C. § 1692a(6); *see Heintz v. Jenkins*, 514 U.S. 291, 292-93 (1995). As "members of a regulated industry," debt collectors, "and their officers, agents, and employees, are required to be conversant" with the FDCPA's requirements. *Int'l Minerals*, 402 U.S. at 569 (Stewart, J., dissenting). The concern identified by Justice Stewart's dissent—that a "casual shipper, who might be any man, woman, or child in the Nation," and "who had never heard" of the law, could be caught up in a complex set of shipping regulations, *id.* at 1704—is absent here. A mistake-of-law defense is unwarranted where "the community have it in their power to become acquainted with the [law] under which they live." *United States v. Smith*, 18 U.S. 153, 182 (1820) (Livingston, J., dissenting).

The sheer "complexity" that has led to "special treatment" in areas like the criminal tax laws is likewise absent. *Cheek*, 498 U.S. at 200. The FDCPA is far more straightforward than the criminal tax or securities laws, or, for that matter, the TILA. It embodies "a set of rules which debt collectors themselves have testified are easy to follow and do not restrict the business of ethical debt collectors." 131 Cong. Rec. H10544 (daily ed. Dec. 2, 1985) (statement of sponsor Rep. Annunzio). The FDCPA, in any event, imposes no criminal liability. A mistake-of-law defense that gives a private party absolute immunity from civil liability under a federal statute is apparently unprecedented. *See Torres v. INS*, 144 F.3d 472, 474 (7th Cir. 1998) (Posner, J.) ("Ignorance of a statute is generally no defense even to a criminal prosecution, and it is never a defense in a civil case, no matter how recent, obscure, or opaque the statute."). One would

think that Congress, before taking such an unusual and dramatic step, would at least say so.

B. Allowing a Mistake-of-Law Defense Would Encourage Lawbreaking, Inhibit the Development of Precedent, Deter Enforcement, and Distort the FDCPA's System of Incentives.

That Congress did not intend to disturb the general presumption against ignorance of the law is strongly supported by the traditional rationales for that presumption, which apply with special force to the FDCPA.

1. Encouraging Bad Conduct. Perhaps the most important justification for the rule is the threat that merely allowing a mistake-of-law defense to be raised will encourage bad conduct. Justice Story sounded this theme when he warned against the "extreme danger of allowing such excuses to be set up for illegal acts, to the detriment of the public. There is scarcely any law, which does not admit of some ingenious doubt; and there would be perpetual temptations to violations of the laws, if men were not put upon extreme vigilance to avoid them." *Barlow*, 32 U.S. at 411; *see* Oliver Wendell Holmes, *The Common Law* 48 (1881) ("[T]o admit the excuse at all would be to encourage ignorance where the law-maker has determined to make men know and obey.").

The danger identified by Justices Story and Holmes is especially great under the FDCPA, which was enacted in response to "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices" that "contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of personal privacy." 15 U.S.C. § 1692(a). When it passed the Act, Congress emphasized that independent debt collectors, the "prime source of egregious debt collection

practices," are unlike the creditors subject to TILA in that debt collectors typically have little or no market incentive to treat consumers properly. S. Rep. 95-382, at 2, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696. "Unlike creditors, who generally are restrained by the desire to protect their good will," independent debt collectors "are likely to have no future contact with the consumer and are often unconcerned with the consumer's opinion of them." *Id.* This consideration makes the debt-collection industry unique from virtually every other industry that regularly interacts with consumers (and is yet another reason why it is implausible that Congress would have excused legal errors under the FDCPA but not under TILA). Moreover, "[c]ollection agencies generally operate on a 50-percent commission, and this has too often created the incentive to collect by any means." *Id.*

For these reasons, a debt collector faced with a choice between two legal interpretations—one profitable but abusive, and the other less profitable but more scrupulous—has every economic incentive to chose the former. In *Johnson v. Riddle*, for example, a debt collector demanded that the plaintiff pay a $250 "shoplifting charge" in addition to the $2.64 face value of her dishonored check, even though the applicable law was "unmistakably clear" that it "did not authorize an ordinary dishonored check claim to be recast as a shoplifting charge in order to claim the higher statutory penalties." 443 F.3d 723, 725 (10th Cir. 2006). The Tenth Circuit freely acknowledged that the debt collector in that case had "collected on 700,000 to 1.5 million checks per year and therefore had a strong self-interest in collecting the [$250] shoplifting penalty rather than the $15 bad-check penalty for each check." *Id.* at 732 n.6. Nonetheless, the court permitted the collector to invoke a mistake-of-law defense and remanded for factfinding concerning the de-

fense. *Id.* at 732. Under the Sixth Circuit's approach, such unconscionable conduct would always be completely immunized, so long as collector could point to generalized attempts to monitor the case law, attend legal conferences, and the like. Pet. App. 15a-16a.

Allowing a mistake-of-law defense for conduct of the kind in *Johnson* will create a race to the bottom—it will reward illegality, allow creditors to hire the least scrupulous collectors, and drive ethical collectors out of business. That result is precisely the opposite of what Congress intended when it enacted a statute with the express purpose of not only "eliminat[ing] abusive debt collection practices by debt collectors," but also ensuring that "those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged." 15 U.S.C. § 1692(e).

2. **Inhibiting Development of the Law.** A second reason to adhere to the traditional presumption in this case is the danger that allowing a mistake-of-law defense will greatly inhibit the development of the law under the FDCPA, both by the FTC and the courts. If debt collectors can avoid liability simply by relying on their own preferred legal interpretations, they will have no incentive to seek authoritative interpretations from the FTC, because the protection of the safe-harbor defense, 15 U.S.C. § 1692k(e), will be superfluous. And if debt collectors can routinely invoke the bona-fide-error defense whenever legal issues are unsettled, there is substantial risk that those issues will stay unsettled longer than they otherwise would, creating further opportunities to invoke the defense.

The decision below—which held the defendants' conduct was completely immunized under the mistake-of-law defense, without ever addressing the legality of the underlying conduct—illustrates the problem. Pet.

App. 1a-18a. This Court's decision in *Heintz*, 514 U.S. 291, which held that attorneys are subject to the FDCPA, supplies another example. If the mistake-of-law defense had been available in the decade before *Heintz* was decided, high-volume collection law firms might have routinely escaped liability for a range of bad practices in the context of collection litigation—even though only one court of appeals had actually held such firms were exempt.[5] That result would have been directly at odds with Congress' intent that "all firms in the business of debt collection must abide by the same rules." H.R. Rep. 99-405, at 6 (1985) (noting that "[l]egitimate and law-abiding debt collection firms have business diverted unfairly as a result of the use of such tactics"). If courts in those cases followed the procedure employed by the decision below, the issue would have remained undecided in many jurisdictions.

A similar concern for development of the law is often raised about the qualified-immunity doctrine, which is perhaps the closest analogue to the defense that respondents propose here. Last term's decision in *Pearson v. Callahan*, 129 S.Ct. 808 (2009), which gave lower courts discretion to reach the qualified-immunity question first, before determining whether a constitutional violation has occurred, was sensitive to that concern. *Pearson* explained that this procedure would not unduly ossify the law because "the development of constitutional law is by no means entirely dependent on cases in which the defendant may seek qualified immunity." *Id.* at 821-

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[5] *Compare Paulemon v. Tobin*, 30 F.3d 307, 310 (2d Cir. 1994), *Fox v. Citicorp Credit Servs., Inc.*, 15 F.3d 1507, 1512 (9th Cir. 1994), *Scott v. Jones*, 964 F.2d 314, 318 (4th Cir. 1992), *and Shapiro & Meinhold v. Zartman*, 823 P.2d 120, 125 (Colo. 1992), *with Green v. Hocking*, 9 F.3d 18 (6th Cir. 1993).

22. Most constitutional issues presented in damages actions will also arise in criminal, municipal-defendant, or injunctive-relief cases—all cases in which qualified-immunity is unavailable. *Id.* But no similar alternatives are available under the FDCPA. When the bona-fide-error defense applies, a debt collector "may not be held liable," 15 U.S.C. § 1692k(c)—period.

3. Problems of Proof and Administration. A third justification for this Court's presumption that Congress does not lightly create a mistake-of-law defense is based on the considerable problems of proof and judicial administration that would follow, including what Justice Story called "the extreme difficulty of ascertaining" whether a party really held a certain view of the law. *Barlow*, 32 U.S. at 411; *see* 1 John Austin, *Lectures on Jurisprudence* 482 (5th ed., Robert Campbell, ed., 1885) ("[I]f ignorance of the law were admitted as a ground of exemption, the Courts would be involved in questions which it were scarcely possible to solve, and which would render the administration of justice next to impracticable.").

In FDCPA suits, that "extreme difficulty" would substantially interfere with Congress's intent that the Act be "primarily self-enforcing." S. Rep. 95-382, at 5, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1699. Under the Sixth and Tenth Circuits' interpretation of the bona-fide-error defense, "the issue of intent becomes principally a credibility question as to the defendants' subjective intent to violate the [FDCPA]." *Johnson*, 443 F.3d at 728. But consumers have virtually no way of determining a debt collectors' subjective knowledge of the law in advance; proving their knowledge or intent would be either very costly or impossible as a practical matter. *Buford*, 333 F. Supp. at 1248 ("If consumers would be required to prove that creditors were determined to violate the Act

in order to prevail, the civil remedy would be a hollow one.") (discussing TILA). That hurdle alone is likely to deter many consumers and their attorneys from filing suit in the first place, particularly given the low monetary stakes in most FDCPA cases. *See* 15 U.S.C. § 1692k(a)(2)(A) (capping statutory damages in individual cases at $1,000).[6]

It is also quite unclear what sorts of mistakes would confer absolute immunity. Would the defense extend to any mistake of law, no matter how unreasonable? Or would it encompass only a reasonable mistake? *Compare* Pet. App. 15a-18a (allowing complete defense for mistake of law, without analyzing reasonableness), *with Seeger v. AFNI, Inc.*, 548 F.3d 1107, 1114 (7th Cir. 2008) (suggesting that the defense requires, at a minimum, reliance on an "informed, but mistaken, legal opinion"); *see* Austin, *Lectures on Jurisprudence*, at 483 ("1st, Was the party ignorant of the law at the time of the alleged wrong? 2ndly, Assuming that he was ignorant of the law at the time wrong alleged, was his ignorance of the law inevitable ignorance, or had been previously placed in such a position that he might have known the law, if he had duly tried?") (discussing the difficulty of such questions).

These problems are bad enough, but they are compounded by the need to fit the square peg of legal error into the round hole of the FDCPA's preventive "procedures" requirement. The circuits have taken divergent

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[6] Actual damages often are not sought under the FDPCA and, when they are, the awards are typically less than $5,000. *See, e.g., Sweetland v. Stevens*, 563 F. Supp. 2d 300 (D. Me. 2008) ($2,500); *Tallon v. Lloyd & McDaniel*, 497 F. Supp. 2d 847 (W.D. Ky. 2007) ($55). Even in class actions, statutory damages are capped at the lesser of $500,000 or 1% of the defendant's net worth. 15 U.S.C. § 1692k(a)(2)(B).

and incoherent approaches to this problem, while acknowledging, as did the pre-1977 TILA cases, that Congress's "procedures" requirement is an odd fit in this context. Pet. App. 13a. The fundamental problem is that the process of forming a legal judgment, unlike the avoidance of clerical errors, cannot be reduced to a fixed algorithm or step-by-step, mechanical process. *See Oxford English Dictionary* (2nd ed., 1989) (defining "procedure" as "A set of instructions for performing a specific task.").

Thus, the courts allowing a mistake-of-law defense have differed over such fundamental questions as whether the adequacy of the "procedures" is a matter of law or a matter for the jury, and whether the "procedures" invoked must even have been directed at the specific legal error. The Sixth Circuit, for example, has suggested that a debt collector can gain immunity solely through generalized compliance efforts—it may "perform ongoing FDCPA training, procure the most recent case law, or have an individual responsible for continuing compliance with the FDCPA." *Hartman v. Great Seneca Fin. Corp.*, 569 F.2d 606, 614 (6th Cir. 2009); Pet. App. 15a-16a, 17a-18a (finding requirements of the defense satisfied based only on such generalized efforts). That approach is difficult to reconcile with the text of the statute, which requires that the procedures be "reasonably adapted to avoid *any such* error," 15 U.S.C. § 1692k(c), *i.e.* the specific error at issue. *See Johnson*, 443 F.3d at 729. The Tenth Circuit's approach is more demanding (suggesting, for example, that the filing of a test case and reliance on a researched legal opinion will not necessarily sufficient), but ultimately leaves the issue to an amorphous, case-by-case weighing of facts—leading to the unseemly prospect of a jury trial assessing the reason-

ableness of a lawyer's efforts to comply with the law. *Id.* at 730-31.[7]

4. Distortion of Incentives. Whatever their differences, the Sixth and Tenth Circuits' formulations both fundamentally distort the function of the FDCPA's "procedures" requirement. When the bona-fide error defense is appropriately limited to non-legal errors, as Congress intended, it creates a powerful incentive for debt collectors to know the law, maintain scrupulous practices, and avoid acts that will cause harm to consumers. If debt collectors maintain such procedures, they can avoid liability for unintentional acts, such as accidentally misstating the amount owed, or calling a consumer in a different time zone after hours, or mistakenly sending a dunning letter to a consumer who has requested no further contact.

But if debt collectors fail to employ proper preventive procedures—if, for example, they take no precautions to ensure that consumers from they seek to collect are not in bankruptcy, or that the amounts stated are not inflated, or that their initial collection demands properly

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[7]The Seventh Circuit has suggested that reliance on a legal opinion is necessary. *Seeger*, 548 F.3d at 1114 (Wood, J.) ("In the end, AFNI is not arguing that it relied on an informed, but mistaken, legal opinion. It is saying that its ignorance of the law should be excused because it attempted to keep itself informed about the law through the various trade association communications. This is not enough, in our view, to support the bona fide error defense."); *but see Johnson*, 443 F.3d at 729 ("guidance from an independent third party, who might not have had the same self-interest" is "not necessary in every case"). A categorical rule of this sort would at least avoid the Sixth Circuit's anything-goes approach, but a regime permitting debt collectors to shield themselves from liability so long as they can purchase a favorable third-party legal opinion has considerable problems of its own. *See* William H. Simon, *The Market for Bad Legal Advice*, 60 Stan. L. Rev. 1555 (2008).

inform consumers of their rights—then they risk liability. It is not unfair to "require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 393 (1965). Debt collectors, not consumers, are in the best position to absorb the costs of that risk or implement preventive procedures and pass the costs of compliance onto their creditor-clients. *See* Richard A. Posner, *The Economics of Justice* 200 (1983); *First Wisconsin Nat'l Bank v. Nicolaou*, 335 N.W. 2d 390, 395-96 (Wis. 1983).

In short, Congress's carrot-and-stick approach to liability creates incentives for debt collectors to ensure accuracy and good care. Respondents' approach would scrap that system of incentives, encouraging "procedures" aimed at justifying debt collectors' preferred legal rules, instead of true preventive procedures designed to protect consumers.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

Description of Individual *Amici Curiae*

Public Citizen, Inc., is a national, non-profit consumer advocacy organization founded in 1971. On behalf of its members, Public Citizen appears before Congress, administrative agencies, and the courts on a wide range of issues, and works toward the enactment and effective enforcement of laws protecting consumers.

Public Citizen's attorneys have served as counsel for parties in this Court's most recent cases arising under titles of the Consumer Credit Protection Act, *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47 (2007) (Fair Credit Reporting Act); *Koons Buick v. Nigh*, 543 U.S. 50 (2004) (TILA), and have argued several appeals in the lower courts in which consumers successfully defeated debt collectors' attempts to introduce novel defenses to liability under the FDCPA.[1]

Public Citizen has also advocated for policies to protect consumers from debt-collection abuses. For example, the organization released influential reports in 2007 and 2008 concerning the abuse of mandatory binding arbitration in consumer debt-collection cases,[2] and played a

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[1] *See, e.g.*, *Reichert v. National Credit Sys., Inc.*, 531 F.3d 1002 (9th Cir. 2008) (construing FDCPA's bona-fide error defense and rejecting defense based on debt collector's reliance on its creditor-client); *Del Campo v. Kennedy*, 517 F.3d 1070 (9th Cir. 2008) (rejecting debt collector's sovereign-immunity defense); *Rosario v. Am. Corrective Counseling Servs., Inc.*, 506 F.3d 1039 (11th Cir. 2007) (same).

[2] Public Citizen, *The Arbitration Trap: How Credit Card Companies Ensnare Consumers* (2007), and *The Arbitration Debate Trap: How Opponents of Corporate Accountability Distort the Debate on Arbitration* (2008), both available at http://www.citizen.org/congress/civjus/arbitration/.

key role in opposing industry efforts to curtail the FDCPA's protections in the 2006 amendments to the Act.[3]

AARP is a non-profit, non-partisan membership organization with nearly 40 million members, dedicated to protecting the financial security of its members. AARP has a significant interest in this case because older people are particularly vulnerable to the abuses of debt collectors.

Advocates representing older consumers in debt-collection cases report that many older people believe that they will go to jail if they receive a court summons. Debt buyers increasingly seek to collect old debt. Older people may not remember or have documentation to show such debt has been paid, and may not recognize the name of the debt if it has been sold to a new creditor. Some people believe they must pay a demand even if they believe they do not owe the debt. Collectors tell people "everyone has to pay something" even if the person's only source of income is Social Security or SSI, and is exempt from collection. The protections provided by the FDCPA are vital to protect the financial security of such vulnerable older people.

Current economic conditions, growing debt burdens, and the rising rate of home foreclosures, make the interpretation of the FDCPA particularly important to older people. An AARP report notes that over 684,000 home-

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[3] Financial Services Regulatory Relief Act of 2006, Pub. Law No. 109-351, Tit. VIII, 120 Stat. 1966 (2006).

owners over the age of 50 were either delinquent or in foreclosure in December 2007.[4]

The age group experiencing the sharpest increase in bankruptcy filings in the period between 1991 and 2007 is the 50-and-older group.[5] Seven million older adults reported problems with medical debt in 2007, even though most of them were covered by Medicare.[6] Between 2005 and 2008, the average amount of credit-card debt for older adults increased by 26%.[7]

The **National Association of Consumer Advocates** (NACA) is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, law professors, and law students whose primary focus involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country and serving as a voice for its members as well as consumers in the ongoing effort to curb unfair and abusive business practices.

Preserving and strengthening the federal consumer-protection laws in general, and the FDCPA in particular,

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[4] Allison Shelton, *AARP Public Policy Institute, A First Look at Older Americans and the Mortgage Crisis* 2 2009), http://assets.aarp.org/rgcenter/econ/i9_mortgage.pdf.

[5] Deborah Thorne, Elizabeth Warren, & Teresa A. Sullivan, *Generation of Struggle* 1 (2008), http://assets.aarp.org/rgcenter/consume/2008_11_debt.pdf.

[6] Michelle M. Doty et al., The Commonwealth Fund, *Seeing Red: The Growing Burden of Medical Bills and Debt Faced By U.S. Families* 2 (2008), http://www.commonwealthfund.org/usr_doc/Doty_seeingred_1164_ib.pdf?section=4039.

[7] Jose Garcia & Tamara Draut, Demos, *The Plastic Safety Net* 4 (2009), http://www.demos.org/pubs/psn_7_28_09.pdf.

has been a top priority of NACA since its inception. NACA supports federal action that would improve the consumer protections provided by the FDCPA for consumers abused and harassed by debt collectors, and opposes any attempts to weaken or diminish the effect of this important law.

The **National Consumer Law Center** (NCLC) is a non-profit corporation organized in 1969 to conduct research, education and litigation to promote consumer justice. One of the NCLC's primary objectives is to provide assistance to attorneys advancing the interests of their low-income and elderly clients in the area of consumer law. Accordingly NCLC has focused considerable attention on laws to prevent abusive debt collection and unreliable disclosure of the terms of consumer credit transactions.

NCLC also has provided research and analysis regarding a wide variety of consumer laws for legal services attorneys, Congress, state legislatures, as well as state and local offices charged with the enforcement of consumer-protection acts. It has participated as counsel, co-counsel, and amicus curiae in litigation at every level throughout the country. NCLC has organized, sponsored and participated in thousands of trainings and conferences designed to provide continuing education for legal services and private attorneys.

The FDCPA and TILA have been a major focus of the work of NCLC. NCLC publishes *Fair Debt Collection* (6th ed. 2008 & 2009 Supp.) and *Truth in Lending* (6th ed. 2007 & 2008), comprehensive treatises, to assist attorneys, creditors and debt collectors in complying with the law. In addition, the NCLC has directly assisted attorneys in thousands of cases arising under the FDCPA and TILA. The FDCPA bears great similarity

to the debt collection provisions of the *Model Consumer Credit Code* published by NCLC in 1974. NCLC was active in legislative process leading to the passage of the FDCPA in 1977 and the amendments to the Truth in Lending Act, testifying at most of the hearings involving those Acts and frequently conferring with counsel to the Subcommittee on Consumer Affairs of the Senate Committee on Banking, Housing and Urban Affairs prior to the FDCPA's passage as well the subsequent passage of the amendments to the Truth in Lending Act that lead to the mistaken interpretation of the FDCPA by the court below.

U.S. PIRG: The Federation of State PIRGs, serves as the federation of, and the national advocacy office for, the state Public Interest Research Groups (PIRGs). PIRGs are non-profit, non-partisan consumer, environmental, and government research and advocacy organizations with one million members around the country.

The mission of U.S. PIRG is to protect consumers and the public by using the tools of investigative research, grassroots organizing, advocacy, and litigation.